HOW DID WE GET HERE? FOREIGN ABDUCTION AFTER ALVAREZ-MACHAIN

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I. INTRODUCTION

Can a country lawfully obtain jurisdiction over a criminal defendant by kidnapping him from another country? For most people, the question defies easy answer. Even supporters of such abductions usually concede that they should be undertaken only in egregious cases, while opponents usually concede an exception for figures like Adolf Eichmann.

International examples highlighting both perspectives are plentiful. Recently, United States officials worked with foreign agents to seize alleged drug lords and their hirelings from several Latin American countries, and U.S. marshals lured a gun-running rogue CIA agent from his Libyan refuge first to the Dominican Republic and then to Washington, D.C. [FN1] British mercenaries have reportedly plotted to kidnap a fugitive from the "Security Express" robbery and return him to British officials. [FN2] In the early 1960s, French operatives abducted a colonial Algerian conspirator from Munich, and Israeli "volunteers" took Eichmann from Argentina. [FN3]

*940 Most recent cases lack such high political and moral drama. General Manuel Noriega's seizure from Panama is an exception, but the abduction claim has been overshadowed by the case's other unusual features-notably, the full-scale war that was necessary to arrest him. [FN4] Yet a disconcerting feature of many recent abductions is their "all-American" nature: kidnappings by Americans or their operatives for trials in the United States.

These abductions have been, for the most part, illegal under the domestic kidnapping laws of the "asylum state" of the targeted individual. But these are no ordinary kidnappings; rather, they are backed by the skill and resources of a powerful sovereign state. Lawyers typically learn of them only when the abductee is brought before an American court for prosecution. The ensuing controversy most often turns not on the legality of the abduction but on the availability of remedies under international or American law. [FN5] Specifically, the debate centers on whether release of the abductee is required because the court lacks personal jurisdiction.

On June 15, 1992, in United States v. Alvarez-Machain, [FN6] the United States Supreme Court held that federal courts can assert personal jurisdiction over a defendant abducted from abroad. Surprisingly, however, the facts in the case were extremely unfavorable for the prosecution: The target, Dr. Humberto Alvarez Machain, was a foreign national; the alleged underlying crime was committed abroad; the defendant was indicted but not convicted; the seizure was not executed on the authority of an arrest warrant; the abduction occurred in Mexico, a country with which the United States had an extradition treaty; the target was abducted by persons deemed to be controlled by U.S. Drug Enforcement Agency (DEA) officials; and the target was held despite multiple official protests by the Mexican government. Confronted by these compelling facts, the U.S. Supreme Court nonetheless held that kidnapping presented no jurisdictional impediment to trial.

The seizure of Dr. Alvarez Machain stemmed from the brutal murder of DEA Special Agent Enrique Camarena Salazar, who was kidnapped outside the American Consulate in Guadalajara, Mexico in February 1985. One month later, authorities found the mutilated bodies of Camarena and his Mexican pilot, Alfredo Zavala Avelar. Since then, approximately two dozen people in the United States and Mexico have been charged in connection with the murders (and the related Guadalajara drug trafficking that Camarena was investigating at the time he was killed). [FN7]

*941 By 1990, seven defendants had been brought before American courts. Of the seven,

three were forcibly abducted to the United States. Among them was Dr. Alvarez Machain, a Guadalajara gynecologist who allegedly injected the dying Camarena with lidocaine, reviving him to undergo more torture. The Alvarez Machain abduction was arranged after informal DEA negotiations with Mexican officials broke down in January 1990. In April 1990, Dr. Alvarez Machain was seized by six armed men and taken first to waiting DEA agents in El Paso, Texas, and then to federal court in Los Angeles.

Within two weeks, the Mexican government lodged the first of three diplomatic notes protesting the seizure. And on May 10, Dr. Alvarez Machain filed a motion to dismiss the charges which claimed outrageous government behavior and lack of personal jurisdiction. The district court dismissed the charges on the ground that the defendant's seizure violated the extradition treaty between the United States and Mexico, depriving the court of personal jurisdiction. The Ninth Circuit affirmed, relying on its recent ruling in the abduction of another Camarena defendant. [FN8] The Supreme Court, however, reversed the Ninth Circuit and remanded the case for trial. [FN9]

The Alvarez-Machain decision sparked a remarkable amount of criticism. [FN10] Far-right columnists and a handful of major papers supported the decision, [FN11] but most media commentary condemned the decision as condoning a lawless policy akin to the practices of terrorist states like Libya and Iran and at odds with the norms of international behavior. [FN12] Anthony Lewis *942 called the result "a radical reinterpretation of the law ... and the latest manifestation of ... a profoundly dangerous" trend. [FN13] Neighboring countries like Canada and most Latin American states, long-time friends including Switzerland and Australia, and more predictable critics, such as Cuba and Iran, agreed with this assessment. [FN14] The Chinese press, eager to discuss a human rights issue other than the Tienanmen Massacre, joined the chorus. [FN15] Internationally, voices echoed the outrage of Justice Stevens' dissent, which branded the decision "shocking" and "monstrous." [FN16]

Criminal defense lawyers have been somewhat surprised by this reaction. Dr. Alvarez Machain is hardly the first criminal defendant whose claim has been rebuffed by the Burger and Rehnquist Courts. Simply put, Alvarez-Machain reflects a familiar Supreme Court pattern in the criminal area. For twenty years, the Court has narrowed defendants' rights in cases involving car searches, statements made in the absence of counsel, drug testing, discovery, identification, bail, and habeas corpus. Recently tightened procedural doctrines, such as state exhaustion and harmless error, bar other claims. The clear message has been that claims involving drugs or international borders will be examined with deference to the prosecution. Furthermore, the Alvarez-Machain decision forecloses a legal claim that never seemed available. For over a century, American courts have responded to defendants' complaints of abduction with identical citations to *943 what is now known as the Ker-Frisbie rule, which holds that abduction does not affect or preclude personal jurisdiction. [FN17] Thus, the reaction of many defense lawyers was: "What did you expect? It's only a slight extension of prior law."

The criminal bar is wrong. Alvarez-Machain represents more than another "drugs and border" criminal case with a foreseeable outcome. The case involves the use of unilateral self-help and extraterritorial force at a time when the perceived post-Cold War norm for international enforcement, whether political or criminal, focuses on joint and collaborative action through established procedures. Multilateral efforts in the Persian Gulf, Yugoslavia, and Somalia and expanded cooperative campaigns against drug trafficking and terrorism are prime examples. Alvarez-Machain, unlike typical criminal decisions, encompasses the divergent goals of aggressive domestic law enforcement and international cooperation. Human rights litigators watched Alvarez-Machain with keen interest as it travelled to the Supreme Court. For them, the case was not a reprise of Ker- Frisbie, but an opportunity to introduce international norms to American courts. The richness and breadth of Alvarez-Machain's human rights and constitutional issues provided them their best opportunity since the first alien tort suits a decade ago. Equally important, the international law responses to extraterritorial abduction could have prevailed against the Executive Branch action-a welcome prospect after the disappointing results of suits against Central American policy [FN18] and the detention of Marielitos [FN19] and Haitians. [FN20] The abduction case was sexy and strong.

And so, the results of Alvarez-Machain and such related cases as United States v. Verdugo-Urquidez [FN21] have united an unusual company of critics - not only the usual flock of defense and civil liberties lawyers and human rights groups, but also leading international law authorities. [FN22] I agree that the Alvarez-Machain holding is "monstrous." But this essay is not another attempt to litigate the case for the defense. [FN23] That task is moot, subsumed *944 by Dr. Alvarez Machain's acquittal. [FN24] In fact, the Supreme Court's holding, however questionable, is the least interesting aspect of the case. Otherwise, commentators would simply have intoned the mantra "Ker-Frisbie applies to treaties" and turned to something else.

This essay focuses instead on the more interesting and important question of the Court's reasoning. To many observers, international abduction cases involve a fundamental balancing of ideals about constitutional limitations against foreign policy needs. The central, if unspoken, issue in Alvarez- Machain is whether the Executive Branch is limited by law in the foreign arena, or whether it possesses a plenitude of inherent and statutory power subject only to the relatively weak political counterweight of congressional oversight. International and constitutional lawyers discuss limitations on Executive power outlined in Articles I and II of the Constitution; criminal lawyers invoke the Bill of Rights. Alvarez-Machain is unusual because it offered the opportunity to join these two discussions about the "Imperial Presidency."

Alvarez-Machain instead addressed another area-treaty law. In Parts II, III, and IV, I will examine the majority opinion by Chief Justice Rehnquist and the dissenting opinion by Justice Stevens, describing their focus on treaty law and explaining why both opinions are unpersuasive. Part V turns to the practical implications of disposing of the case on treaty grounds, which could include giving the Executive Branch almost unlimited power to abduct. Part V also critiques some of the reform proposals being advanced by academic critics and considered by Congress, arguing that if regulation does succeed, the explanation may lie in the high cost of abductions. But agency budget constraints alone cannot restrain the Executive Branch; meaningful legal oversight is necessary. Part VI explores the Executive Branch position that abduction may be appropriate in certain cases and identifies a limited and neutral class of legitimate abductions which satisfy policy pressures to abduct in a principled manner.

II. The Strategies of the Alvarez-Machain Opinions

Forcible abductions aimed at delivering a kidnapped defendant for trial in another country have always occurred. Published diplomatic exchanges and scores of cases illustrate this hard fact. [FN25] But few of the examples involve abduction despite an international treaty, and there is little case law on *945 whether treaties preclude international abduction or subsequent trial. [FN26] The Supreme Court faced the latter question in Alvarez-Machain after the lower courts found a "treaty" exception to the general rule permitting jurisdiction regardless of how the defendant came before the forum.

Chief Justice Rehnquist, joined by five justices, disagreed with this conclusion, and held that no such treaty exception existed. Affirming a rule first announced in United States v. Rauscher, [FN27] he agreed that a defendant tried in violation of a treaty was improperly within a court's jurisdiction and thus entitled to be released. [FN28] But, he continued, forcible abduction does not violate the U.S.-Mexico Extradition Treaty. The treaty did not expressly preclude abduction, nor was the abductee brought before the court "by virtue of proceedings under an extradition treaty." [FN29] Moreover, the treaty does not "purport to specify the only way in which one country may gain custody of a national of the other country for the purposes of prosecution." [FN30] In the absence of a treaty (or other international law violation), [FN31] the claim fell within the familiar Ker- Frisbie rule that improper arrest or seizure does not preclude jurisdiction.

Justice Stevens' dissent, joined by Justices O'Connor and Blackmun, also focused on treaty interpretation. According to the dissent, the treaty was broad and comprehensive; any reasonable effort to construe its terms, articles, and purpose would conclude that it was intended to preempt state-sponsored abduction. [FN32] The dissent distinguished the

Ker-Frisbie rule on the facts of the underlying cases. [FN33]
Of course, neither of the principal authorities, Ker v. Illinois or Rauscher, is unambiguous. In Ker, Henry Julian, a Pinkerton detective, was sent to Peru to deliver an extradition warrant for American fugitive Frederick Ker. Instead, Julian Abducted Ker and brought him back to Illinois for trial. [FN34] Since that time, Ker has been broadly cited as the leading common law support for the proposition that irregular seizure does not preclude jurisdiction. It has never been clear, however, whether Ker was meant to address private abduction, voluntary surrender, or the problem of a state unable to conduct its routine affairs. Indeed, the basic facts of Ker were in doubt until 1953. [FN35] Regardless, the authority of Ker was cemented by Justice Black's pithy conclusion in Frisbie v. Collins that "due process of law is satisfied when one present in court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with *946 constitutional procedural safeguards." [FN36]
Not even this affirmance, however, explains the durability of Ker, now joined siamese style to Frisbie, or its decisive role in Alvarez- Machain. First, the central premise of the Ker rule-that pretrial misconduct is outside the purview of a court-has long since been abandoned elsewhere in criminal procedure. [FN37] Second, the nineteenth-century precedents on which the rule relies, notably the English case Ex Parte Scott, say little about jurisdiction and nothing about relevant international law. [FN38] Third, the facts of Alvarez-Machain differ from those of both Ker and Frisbie in important ways: Ker involved a private abduction that was not protested by the asylum state, and Frisbie involved a wholly domestic abduction (and consequently did not involve treaty or international law). [FN39]
Rauscher is no more compelling than Ker-Frisbie, however. The Court has always read Rauscher narrowly, particularly its conclusion that repatriation is an appropriate remedy for the abductee. [FN40] For a century the Court has declined to require repatriation for violations aside from the "specialty" rule. Finally, like Ker, Rauscher rested on unsure legal foundations when decided, endorsing an allegedly widespread principle of the law of nations for which only mixed support actually existed and which the United States government vigorously opposed. [FN41]
Although these points do not completely negate the authority of either Ker or Rauscher, they do call their weight into question. In reality, the Alvarez-Machain opinions rest heavily on two century-old, entrenched cases, both of which have been open to attack.

*947 III. THE MAJORITY'S STRATEGIC CHOICES

A. Traditional International Law: The Road Not Taken

The majority could have accomplished either of its possible goals, ensuring that Dr. Alvarez Machain was tried in the United States or reversing the Ninth Circuit's interpretation of treaty violations, using traditional international law. Foreign abduction and arrest outside of an extradition treaty would admittedly violate international law. However, the existence of a treaty implicates an interested third party, the government of the asylum state. The majority could have argued that while abductions outside of a treaty violate international, and by incorporation, American law, there is no defense or remedy for the individual.
To reach that result, however, the Rauscher rule, which holds that violation of a clear treaty provision may preclude jurisdiction and result in repatriation, would have to be sidestepped. But avoiding Rauscher would have been straightforward. The Court would have continued the century-long pattern of confining Rauscher to its facts and reading international law to preclude the claims-however meritorious-of abductees, reserving the treaty grievance for the Mexican Government, which could seek resolution through diplomatic avenues. [FN42] The result would have been a short opinion conceding a violation of the treaty and international law but relying on the lack of an individual remedy to reinstate American jurisdiction. [FN43]
Both foreign policy realists and human rights activists have reason to challenge these traditional arguments. Every legal system contains wrongs without remedies-violations either too trivial, new, or complex for judicial remedy. But a system that consistently responds to violations of law with the excuse of a lack of remedies should prompt skepticism.
Traditionalists assert that malefactor states which refuse to make adequate reparation after

diplomatic and political protest face the stigma of condemnation by the world community. While this does happen occasionally, as Libya discovered after its refusal to extradite two officials allegedly involved in the terrorist bombing of Pan Am Flight 103, stigmas and weak sanctions are, at best, sporadic responses, and states often stonewall after violating international law.

Traditional international law's failure to provide remedies for victims of contumacious wrongdoers is only half the problem. Of equal concern is the absence of a principled distinction between cases where a remedy is obtained and those lacking a remedy. For example, the United States belatedly freed Sidney Jaffe, kidnapped from Canada by American bail bondsmen in 1981, [FN44] *948 and Germany eventually released Berthold Jacob-Salomon, who was snatched from Switzerland by the Nazis. [FN45] Under international law, these cases were neither stronger nor weaker than those of other abductees, including Eichmann, Ker, and Alvarez Machain, who were not released. Politics alone accounts for the different outcomes. Perhaps the accommodation of law to state power makes sense in the area of foreign abduction. But it should be stressed that the regime of international law is being bargained away. An aggrieved country will not enjoy a remedy as of right, but only if compliance benefits the offending country.

It is unlikely, however, that the Alvarez-Machain majority avoided traditional international law because of the lack of effective remedies. On the contrary, using traditional reasoning offered the Court several advantages. First, casting its argument in terms of mainstream international law would probably have muffled some of the widespread anger provoked by the decision. Second, foreign relations authority would have been deferred to the Executive Branch, eliminating separation-of-powers concerns. Third, traditional international reasoning would have modified the Ker-Frisbie rule only slightly. Ker-Frisbie would still have applied in cases of domestic and international abduction not involving protests or treaties, and would not have been applicable only in cases featuring an extradition treaty, official abduction, and foreign protest. In cases where Ker-Frisbie did not apply, the outcome would have been assured nonetheless, albeit by denying the abductee a remedy under international law. Thus, traditional international law offered the Court its desired result, on familiar grounds and with safe consequences. Moreover, the theory dovetailed with recent case law, [FN46] and was endorsed by such prominent figures as former State Department Legal Advisor, Judge Abraham Sofaer. [FN47] Why the Court chose to argue affirmatively the unnecessary and problematic claim that no treaty violation had occurred rather than conceding such a violation is the principal surprise of Alvarez- Machain. [FN48]

B. The Majority's Treatment of International Law

The Court's conclusion that international law had not been breached required proving that neither the provisions of a binding treaty nor the equally binding norms of customary international law were violated. The Court addressed the treaty issue, albeit in startling fashion, but remained almost totally silent as to customary law.

*949 1. Treaty interpretation after Alvarez-Machain.

Apart from the "shocking" abduction itself, perhaps no feature of Alvarez- Machain attracted more criticism than the majority's startling conclusion that treaties create little more than policy options. [FN49] The Court held that the 1978 treaty between the United States and Mexico outlined only one possible procedure for rendition, extradition under the treaty; nothing in the treaty specifically disallowed employing means not mentioned in the treaty, including abduction. [FN50] One would never claim that, when a retailer's bill of sale does not explicitly prohibit breaking into his warehouse and taking additional items, the buyer is tacitly authorized to do so, but the court seemed to read precisely that meaning into the extradition treaty. Furthermore, the argument that broad foreign relations texts merely create policy options was not an isolated instance of interpretive whimsy. On the contrary, this argument has been successfully advanced over the past decade in several contexts, and the results have consistently strengthened the Executive Branch's discretionary power. [FN51]

To some extent, the argument that extradition treaties do not exhaust the potential means of rendition is judicial sleight of hand. The Court failed to mention that the other means involve

obtaining the consent of the asylum state. [FN52] Treaties neither address nor automatically preclude consensual bilateral rendition or unilateral action by the asylum state, such as voluntary surrender, expulsion, or deportation. While the majority is literally right in stating that the extradition treaty does not expressly preclude abduction, none of these scenarios is applicable to abduction over the active protest of the territorial state.

How broad is the extradition treaty between the United States and Mexico? It is as detailed as most modern extradition treaties, and far more detailed than the single-paragraph extradition provision interpreted in Rauscher. However, U.S. officials did not formally seek to extradite Alvarez Machain. Does the treaty apply nonetheless, excluding other, forcible means of rendition, such as abduction?

Nothing in the treaty expressly forbids its own total negation. Actually, avoiding the treaty procedure in a case where it arguably ought to apply presents a somewhat nonfalsifiable claim, and there are few cases on point. [FN53] *950 Violation of Article 6 (double jeopardy) or Article 8 (capital punishment) is capable of proof. A breach of the entire treaty can only be argued by reference to the standard canons of treaty construction.

Unfortunately, the standard methods of treaty construction do not yield a clear answer. The U.S.-Mexico treaty does not directly address alternative means of rendition, such as abduction, and neither the negotiating history nor the ratification process discloses the intent of the parties on this point. The amici to the Court and critics of the decision have argued that the intent of the treaty partners must have been to invoke respect for boundaries and state sovereignty and to eliminate border violence, fostering bilateral cooperation by prohibiting state-sponsored abduction. [FN54] In the aftermath of Alvarez Machain's acquittal, it is relevant that the likely purpose of Treaty Article 3 ("Evidence Required") was to prevent the rendition of suspects against whom only speculative evidence of criminal guilt existed.

The Chief Justice imputed a different intent to the parties, asserting that because Mexico knew about both past abductions (from at least 1906) and the Ker-Frisbie doctrine, it was cognizant of American practice. Mexico's failure to insist upon or to insert a ban on abduction into the treaty showed that such a ban was not part of its bargain. [FN55] Consequently, inferring a ban would constitute an impermissible judicial amendment to the treaty. [FN56] However, not one of the more than one hundred bilateral American extradition treaties in force expressly forbids abduction. Even treaty partners that vigorously protest kidnapping incidents and seek to punish kidnappers assume that customary law and current extradition treaties already ban abductions. [FN57] But, as the majority recognized, universal silence cannot prove an affirmative claim.

What, then, did the parties really intend? Mexico may have hoped that agreeing to extradite fugitives would lead its northern neighbor to ease, if not halt, the practice of abduction. For its part, the United States may have hoped for greater Mexican cooperation while reserving an asserted right to *951 abduct. Rather than precluding or permitting the practice, the two countries likely ignored abduction because of fundamental disagreements and fear that broaching the issue would scuttle treaty negotiations. If the United States and Mexico did deliberately side-step the issue, then both the majority and the dissent in Alvarez-Machain misleadingly interpreted the treaty. In fact, the treaty has no one intention to construe.

The heart of the majority position is that, in the absence of legislative history or actual intent, the treaty ought to be interpreted literally, stripped of any context. Whatever is not forbidden is thus permitted- including, as Justice Stevens acidly noted, torture and execution. [FN58] This maxim, however, is not applicable to treaty construction. Nothing in the considerable international literature on treaty construction supports the view that extradition treaties are to be read so narrowly. Certain kinds of treaties, notably in the arms control area, are read narrowly to permit whatever is not clearly prohibited, but generally treaties are to be interpreted liberally. Customary international law, as viewed both in the writings of publicists such as Lord McNair [FN59] and in instruments such as the Vienna Convention on Treaties, [FN60] stresses the purpose of the treaty, its plain language, and good faith interpretation. [FN61] This extradition treaty, interpreted consistently with these customary canons, governs all bilateral rendition, [FN62] with the intent to facilitate cooperation in lieu of lawless alternatives.

The majority's literalist theory of treaty interpretation is implausible precisely because it ignores these widely accepted notions of treaty construction. The majority did not invent this literalist theory. It was advanced by a dissenting justice in 1886, [FN63] implied in a Justice Department opinion thirteen years ago, [FN64] and argued vigorously by the Department before the lower courts in Alvarez-Machain and Verdugo- Urquidez. [FN65] Now, even though endorsed by the Supreme Court majority, the theory fails to carry its weight. To my knowledge, no public supporter of the outcome in Alvarez-Machain has endorsed the majority's transparent, result-oriented reading of treaty construction. [FN66]

*952 2. The substance of customary international law.

While most of the reaction to Alvarez-Machain centered on its unusual handling of the extradition treaty, many in the international law community focused instead on the Court's treatment of customary international law. [FN67] That body of law contains not only canons for treaty interpretation, but also substantive norms regarding abduction. The Court virtually ignored this law, however, rejecting such an argument as backed "with only the most general of international law principles to support it," even if abduction "may be in violation of general international law principles." [FN68] What are these general principles, and what force do they have?

Hornbooks teach that customary international law is valid and binding. Although practical questions about customary law exist-such as when new norms ripen into custom-there is no serious dispute as to its binding effects. And few question the bedrock norm of international law: Using force without consent in the territory of another sovereign is prima facie wrong. [FN69]

But the norm precluding abduction as well as other extraterritorial force is only one applicable tenet. An equally potent customary norm permits jurisdiction and trial even after an irregular arrest: male captus, bene detentus (loosely translated: "improperly captured, properly detained") which in effect links the Ker-Frisbie rule to international law. There is ample support for male captus in mainstream international law, upon which the Court could have relied to reverse the lower courts. Using male captus, the majority would have conceded the illegality of the abduction but denied on international grounds that illegal rendition bars jurisdiction. [FN70]

In fact, the failure to take the much anticipated next logical step attracted the interest of international lawyers. Male captus is seen in some quarters as a dangerous relic of a less enlightened era, which jeopardizes individual rights by permitting abductees like Alvarez Machain to stand trial. There is emerging support for the proposition that male captus either has been, or ought to be, repudiated in favor of a rule barring trial after abduction. [FN71]

Even assuming for the sake of argument that international support for the male captus norm is eroding, the Court was still free to reason that although abduction and subsequent trials are both impermissible, American constitutional law nonetheless permits the Executive Branch to violate international law. This seemingly remarkable but widely accepted *953 rule of law is derived from The Paquete Habana, [FN72] decided almost one hundred years ago. In the case, Justice Gray noted in dicta that customary international law is to be applied "where there is no treaty and no controlling executive or legislative act or judicial decision." [FN73] If the decision of the Executive Branch to abduct Alvarez Machain is deemed the controlling juridical act, then American law permits his trial after abduction.

Specifying what and whose act might negate a customary rule under the Paquete Habana formula has presented American international and constitutional lawyers with one of their hardest tasks. This difficulty explains the references in the Alvarez-Machain amici briefs to whether the President or senior Executive Branch officials ordered or ratified the abduction. It also clarifies the discussion as to whether the abduction represented a unilateral Executive Branch reinterpretation of a ratified treaty, which would not be considered a "controlling" act. [FN74] Champions of congressional involvement in foreign affairs and human rights lawyers generally argue that the reference in Paquete Habana to "controlling" executive and legislative acts suggests that only certain executive acts can trump customary norms. Otherwise, these advocates maintain, courts must reject unreasonable executive determinations. [FN75] Hard-line supporters of an imperial presidency counter that almost

any Executive Branch act authorizes the breach and supersession of customary international law. [FN76] Armed with that latter argument, the majority could have used customary law to its advantage.

Yet the Alvarez-Machain majority resisted the temptation to utilize customary law or the Paquete Habana formula of controlling Executive Branch acts. [FN77] The majority concluded that customary international law was simply *954 too general for concrete application. [FN78] This dismissal of customary law disappointed various legal constituencies, ranging from the Reagan-Bush Justice Department to the human rights bar. By stressing state practice rather than ostensibly "general" customary principles, the majority lent legitimacy to all state practices, instead of state practices that are "accepted as law" [FN79] or "followed from a sense of legal obligation." [FN80] In other words, the majority's strategy trivialized customary norms and their bases of legitimacy.

3. Judicial marginalization of customary international law.

More important than the response to any specific nonabduction norm is the majority's contemptuous attitude towards international law. The majority seems to disregard customary international law, treating it like a morganatic child of the legal system. This dismissive attitude goes beyond a single majority opinion and the attitudes of any particular justice. It is characteristic of American attitudes in most international law cases and of the reservations the Congress expresses in ratifying treaties and passing implementing legislation. The United States simply does not trust international law, particularly customary law.

In contrast to modern American attitudes, early nineteenth century American jurists, such as Justice Story, Chief Justice Marshall, and their common law forbears, recognized the importance of international law-"the law of nations"- to our law and the reverence it should be given. [FN81] The contrast with post-World War II attitudes towards international law is stark, and helps to explain the reasoning of the Alvarez-Machain majority.

One explanation for the diminished import of international law in American law involves the change in American power and self-confidence. America was a weak newcomer in a world of warring powers in the early nineteenth century. Any neutral body of rules that protected shipping, passage, and territorial integrity benefited the United States. As importantly, many early American leaders valued the law of nations because they viewed international relations as a system in which morality and right mattered. [FN82] As America ascended to superpower status, however, international law began to represent the feeble attempts of weak countries to restrain the strong.

International law has also changed. The early nineteenth century law of nations was largely "unwritten." It was principally found in the writings of *955 the leading jurists, the "publicists," rather than in treaties. International law was part of a larger intellectual effort to present all law in scientific form: the law of nations, the law of nature, divine law, and municipal law. The law of nations sprang from the natural law premises of the Enlightenment. It was universal, reasonable, and part of a general moral framework. [FN83]

But in recent decades, international law has looked very different, more positivistic, for two reasons. First, the number of state-generated instruments has exploded. Since 1945, the United Nations has registered some 30,000 bilateral and multilateral instruments. [FN84] Second, the growth in treaty law has substantially affected customary law, as evidence of customary law is drawn in part from these conventional instruments. The positivistic hue of this burgeoning international law has seemed to threaten American judges and legislators-especially the provisions addressing social and economic rights. Instead of the clear moral principles of 1800, modern international law seems to represent the commands of rival sovereigns, grounded in the majoritarian politics of the U.N. and operating without the authority of the appropriate American institutions. [FN85]

With these changes in international law, the aversion of American courts is hardly surprising. [FN86] Cases like Filartiga v. Pena-Irala, [FN87] in which the Second Circuit relied on customary law to ground an action for state- sponsored foreign torture, and its progeny [FN88] may signal the resurgence of international law in America. But for the moment, at least, such cases are still exceptions. The forty year delay in ratifying the Genocide Convention, the refusal to ratify most human rights conventions, and the doctrine of non-

self-executing treaties all illustrate the prevailing American distrust of international law. [FN89] The same skepticism of international norms and institutions anchored the American refusal to submit to the jurisdiction of the Court of International Justice in 1985-1986, [FN90] and it may have swayed the majority in Alvarez-Machain.

*956 4. Limited deference to the Executive.

Despite the majority's contemptuous view of treaty interpretation and international law, it unexpectedly used the extradition treaty to support a continuing role for the judiciary in American foreign relations law. In one sense, the Alvarez-Machain majority deferred to the Executive Branch, reasoning that inferring a no-trial-after-abduction clause would constitute a unilateral judicial amendment to the treaty, violating the separation of powers. [FN91] However, this version of institutional deference was incomplete and gave political branches-particularly the Young Turks in the Department of Justice-less than they wanted. The Alvarez-Machain majority disappointed the other branches by declining to hold that the Executive Branch has exclusive control over extraterritorial enforcement (particularly in the absence of statutory regulation), that the President has nonreviewable or inherent powers in the foreign arena, [FN92] or that trial after foreign abduction presents a "political question." [FN93]

Instead, the Court followed the judicial inclination to dance around the nonjusticiability rationale in the foreign relations area. This trend, apparent in such cases as Japan Whaling Ass'n v. American Cetacean Society, [FN94] involves the following choreographed steps: (1) acknowledging that deference to the political branches is the prevailing rule; (2) refusing to defer in this specific case, noting that the leading statement on deference to the political branches, Baker v. Carr, [FN95] does not require it; and (3) affirming the Executive Branch claims after looking at the case on its merits. The Executive Branch wins-not automatically, as it would without judicial scrutiny, but on the merits.

The difference between deferring to executive discretion under a "political question" or some similar analysis, on one side, and a substantive holding in favor of the Executive Branch on the other, did not matter to Alvarez Machain, nor does it affect the general policy surrounding criminal abductions. In the short run, it is interesting in only a theoretical sense that the Court chose to remain an institutional "player" in the foreign arena by virtue of its competence to interpret treaties, given that the majority's reasoning relies on treaty avoidance.

The difference between jurisdictional and substantive defeat for abductees and other claimants may, however, have a considerable political *957 impact. Dismissing a challenge on "political question" grounds forces claimants to resort to Congress, the ballot box, picket lines, television ads, and similar public forums. Democratic theory and separation-of-powers doctrine both suggest that the political branches and the public sphere are the appropriate forums for decisions on foreign relations policy issues. There is a correlation, however difficult to document, between the judiciary's consistent reluctance to rule on the merits of foreign policy and the emergence of a broad national consensus around such divisive issues as nuclear weapons testing [FN96] and deployment, [FN97] the Vietnam War, [FN98] and Central American policy. [FN99] The political branches were able to treat those issues adequately. Foreign abduction, however, has few constituencies and little ability to find a public forum, particularly after the initial shock of isolated kidnappings dissipates.

Thus, the Court had little choice but to accept its own competence to hear Alvarez Machain's case. The manner in which criminal defendants are brought to justice is a question close to the core of the judicial enterprise. [FN100] So the Court proceeded on the merits of the case, necessarily retreating from the full scope of the imperial presidency theory. Although the Court ultimately gave the Executive Branch carte blanche to enforce the law abroad, it fired a pea-shooter across the bow of executive authority by examining the substance of the treaty and addressing the case on its merits. The majority reasoned that although international law does not check executive enforcement abroad, there nevertheless remains a nominal role for the judiciary. This mixed conclusion may be disappointing in many quarters, but is probably not surprising to any student of post-war American thinking on international law.

C. Extraterritorial Policing, Extraterritorial Rights

The Alvarez-Machain majority doubtless recognized that basing its decision on international law would provoke these difficult questions about human rights norms and Executive Branch discretion. It apparently felt that the safer course involved risking the firestorm of criticism for the treaty- *958 avoidance doctrine and to let Ker-Frisbie explain away any remaining difficulties with foreign abduction. In using criminal procedure jurisprudence in this way, however, the majority had to address a second problem: whether rights apply abroad, regardless of their content at home. The majority could have reasoned that some constitutional claims did not apply to abduction abroad, based solely on the territorial scope, not the substance, of the asserted right. By choosing instead to reason along the lines of Ker-Frisbie, the Court made two distinct points: that the familiar no-divestiture-of- jurisdiction (Ker-Frisbie) rule applied, and that an analysis treating domestic (Frisbie) and foreign (Ker) acts alike was appropriate. The implications of this latter choice about rights and their reach should be examined carefully.

1. The extraterritoriality of rights.

To whom do constitutional rights attach? They certainly apply to American citizens in America. This minimalist description, however, ignores the claims of different classes of noncitizens: the foreigner in America; the citizen abroad; the alien abroad. Two broad, admittedly imperfect paradigms are used to address these situations. [FN101] One model assumes that constitutional rights act as a check on governmental power; those facing the legal power of the American government have constitutional rights that constrain governmental action. Under the second model, only persons possessing sufficient contacts with the United States (i.e., physical presence or citizenship) can claim rights. In the first scenario, Alvarez Machain arguably has a claim against abduction. In the second, he clearly has none.

The most recent Supreme Court analysis of the foreign reach of American rights firmly adopted the second, limited model of territoriality. Ironically, the case, United States v. Verdugo-Urquidez, [FN102] involved an appeal by another defendant implicated in Guadalajara drug activities and the Camarena killing. Verdugo Urquidez was abducted from Mexico and held for several days in a Los Angeles jail while DEA agents searched his Mexican property without a warrant. A concurring justice granted that the warrantless search would have been unconstitutional had it occurred in the United States. [FN103] However, the Court, in an opinion authored by the Chief Justice, asserted that the Fourth Amendment does not apply to foreign searches. The Court argued that the applicability of a right abroad depends on constitutional text, history, and consequences. [FN104] Applying that test to the Fourth Amendment, the Chief Justice, joined by a plurality, argued that the right of "persons" to be secure in their homes was a territorial right that *959 applied only to "we the people," to persons and homes in America. [FN105] Our ideals may be a beacon to the world and a light unto the nations, but our constitutional rights cannot be imposed on neighbors. For Fourth Amendment purposes, the Constitution creates two worlds, America and terra incognita-and the Constitution applies only in America.

Why did the Alvarez-Machain majority decline to use the Verdugo- Urquidez standard in addressing the constitutional issues of foreign abduction? The Verdugo-Urquidez test reflects the facts of Alvarez- Machain better than its own. Unlike Dr. Alvarez Machain, Rene Verdugo Urquidez did have a significant territorial link with America. He was within the United States at the time his asserted Fourth Amendment rights were violated. [FN106] Applying the Verdugo-Urquidez analysis to an abduction would mean that because a Mexican defendant in Mexico has no American rights to assert, then after abduction he has no grounds on which to attack the trial court's jurisdiction.

In fact, a Verdugo-Urquidez analysis offered the majority considerably more than another way to reverse the lower courts. First, the social compact and territorial reasoning in Verdugo-Urquidez would resonate, if superficially, across the political spectrum. [FN107] More importantly, Verdugo-Urquidez provides critical support for American law enforcement activities abroad. Although under the traditional view of territorial enforcement power each nation would exercise "jurisdiction to enforce" almost exclusively within its own boundaries,

this is no longer an accurate description of American law enforcement activities. American customs officers greet the traveler at checkpoints in Caribbean airports, DEA agents pursue investigations in Mexico and other Latin American countries, and American military, customs, and DEA units assist in combing jungles for drug crops and laboratories. It is a brave new world of joint investigations and cooperative police work. San Diego and Tijuana alike are routine assignments for DEA "beat cops."

The difficult question is not whether American law enforcement officials can, by right, enforce U.S. law in other countries. The presence of U.S. agents is typically authorized by the host government, [FN108] and even without *960 foreign authorization, then Assistant Attorney General William Barr concluded that the President has both statutory and inherent authority to send federal agents abroad. [FN109] The compelling new question concerns whose standards these extraterritorial American agents will follow. Under Verdugo-Urquidez, U.S. agents in foreign countries should conform to local standards but not American constitutional law, a logic which defines "abroad" as a constitutional free-fire zone.

Proponents of the Verdugo-Urquidez territoriality test emphasize the sovereignty of the host country, arguing that as guests, American officials should abide by their host's standards. [FN110] But that argument is disingenuous. Local standards are often less stringent than U.S. requirements, and local officials can be manipulated. Moreover, respect for other nations' sovereignty would require the United States to follow foreign rules that impede American interests.

Verdugo-Urquidez should be considered a disaster precisely because it exempts the government's extraterritorial acts from constitutional constraints and oversight. Divorcing modern constitutional criminal procedure from extraterritorial American policing permits our agents to behave in a dubious fashion, and to act in concert with those lacking rules or scruples. Even where an activity is regulated by American statutes or departmental regulations, such as official torture, Verdugo-Urquidez permits U.S. officials to benefit from the zeal of local police officials. Thus, the Second Circuit permitted the prosecution of a Chilean national who had been brutally tortured by Chilean police and then escorted to New York. [FN111] Earlier Supreme Court decisions recognized the possibility of this kind of manipulation and evasion of law in the context of federal-state law enforcement in the half-*961 century between Weeks v. United States [FN112] and Mapp v. Ohio. [FN113] As a result, the Court restricted the benefits which federal authorities could garner from state agents acting outside of the Fourth Amendment or the exclusionary rule. [FN114] Courts have similarly limited the government's ability to use evidence obtained by private persons, who are normally not restrained by the Fourth Amendment when they act at the behest of government officials. [FN115] But in the case of policing abroad, Verdugo-Urquidez allows U.S. officials to use the ill-gotten gains, including evidence and the arrest, of abusive conduct by foreign police officials.

An even greater problem is the near impossibility of formulating a neutral account of the disputed incident, and thus of determining whether any departmental or statutory rules were violated. While comparable police abuses occur in the United States, courts and counsel can readily investigate such incidents. With extraterritorial policing, however, the alleged victims are invariably unable to prove to the satisfaction of an American court that torture or some other abuse occurred, that it was perpetrated by Americans, or that it was sufficiently egregious to allow redress. [FN116] No claimant has ever prevailed under the Toscanino exception, which concedes that a "complex of shocking governmental conduct might be sufficient to convert an abduction which is simply illegal into one which sinks to a violation of due process." [FN117] While most allegations may be unfounded, it simply defies belief that in every instance, American extraterritorial policing is conducted within its ostensible regulatory framework. Most likely, the difficulties of establishing proof from a distance all but preclude the possibility of successfully proving extraterritorial police abuse. If so, the solutions are either to apply an exclusionary rule or to abandon the pretense of "meaningful" oversight. Verdugo-Urquidez opts for the latter.

2. The oversight problem and subject matter jurisdiction.

The other major difficulty with employing a territoriality test to establish the scope of rights is

the increasing number of foreign acts and individuals being brought within the reach of American justice. In addition to pursuing individuals abroad more systematically, [FN118] the criminalization of acts with *962 no territorial links to America is growing. [FN119] The United States has criminalized such extraterritorial white-collar violations as antitrust, securities, and export and re-export control violations, [FN120] as well as violent acts like hijacking. [FN121] Indeed, the cases against Alvarez Machain and his alleged associates were predicated on the claim that U.S. courts have subject matter jurisdiction over them for crimes committed in Mexico. [FN122]

There are many widely accepted international law theories under which foreign acts can be criminalized, allowing American law to reach more acts and more defendants. Foreign acts, such as hijacking a plane with American passengers, or killing a DEA agent, thus transform the entire world into a local precinct in which nearly all persons are fair game. Verdugo-Urquidez allows American law enforcement officers to search, abduct, and generally investigate an ever broadening range of targets. The expansion of the playing *963 field is precisely why limits must be set on American enforcement practices.

3. The reaffirmation of Ker.

The Verdugo-Urquidez plurality holding that rights essentially end at the U.S. border is indefensible. It removes constitutional oversight and moral legitimacy from law enforcement, replacing them with discretionary Executive Branch power. It permits American jurisdictional and enforcement power to reach farther than American rights. [FN123] Nevertheless, Verdugo-Urquidez is "good law" and was available to the Court as it considered Alvarez-Machain. The majority instead relied on Ker-Frisbie and principles of treaty construction, bypassing the Verdugo-Urquidez analysis entirely. [FN124]

Why did the Alvarez-Machain Court abandon Verdugo-Urquidez's territoriality test in favor of Ker-Frisbie? In part, the Court may have intended to make a didactic point to the lower courts. Once the district and appellate courts opened the possibility of a treaty-breach exception to Ker-Frisbie, that door had to be closed decisively. Beyond that, the majority did not need the Verdugo-Urquidez territoriality test because Ker-Frisbie permitted jurisdiction after any improper arrest. Third, the broad Verdugo-Urquidez framework might actually have been insufficient to sustain jurisdiction over abductees, because the trial would be in America. Additionally, Verdugo-Urquidez allowed for the possibility that U.S. citizens, resident aliens, and others with "contacts" with the United States would be entitled to constitutional protection. Applying the Verdugo-Urquidez framework to abductions would undermine Frisbie by conferring constitutional rights on domestic abductees. That threat had to be disarmed.

The larger issue of the extraterritorial policing cases was raised in Verdugo-Urquidez and remains unresolved by Alvarez-Machain. Should identical police behavior by American officials enforcing identical criminal provisions be treated differently when it occurs in Tijuana rather than San Diego? In this particular case, given current heightened extraterritorial policing, the Alvarez-Machain Court answered "no," using logic resembling a good news/bad news joke. The good news is that Alvarez-Machain does not rest on a destructive us versus them distinction. The bad news is that neither of us has constitutional rights against police-sponsored abduction.

IV. THE DISSENT'S RELIANCE ON THE TREATY

Justice Stevens' dissenting opinion also takes a wrong turn into treaty analysis. His hand was forced, in part, because both the lower courts and the majority relied on treaty grounds. But the real attraction of the treaty argument was the apparent foreclosure of all other lines of argument by earlier Court rulings. Justice Stevens was of course free to open those issues by *964 arguing for the reversal of Ker-Frisbie or for the use of human rights law. Significantly, but not surprisingly, he instead engaged the majority directly on treaty grounds, without much success.

A. An Assault on Ker-Frisbie

A frontal assault on Ker-Frisbie would have essentially recapitulated the evolution of criminal procedure in the twentieth century. In light of the revolution in due process jurisprudence since Ker, due process arguably ought to cover not only searches but also arrests, both domestic and extraterritorial. After all, the differences between seizures of things and persons are not significant, as a matter of policy or constitutional law, and nothing short of the divestiture of jurisdiction-a counterpart to the exclusionary rule-will deter improper arrests. Ker remains an archaic remainder of an era before the constitutional regulation of criminal law enforcement. [FN125] Finally, whatever its merits as policy, the Ker- Frisbie jurisdiction rule is only minimally supported by the Ker case itself. [FN126] In short, the time for Ker's reversal is ripe, even overdue.

The problem is that courts have been extremely reluctant to scuttle, or even modify, Ker-Frisbie. However distasteful the rule is to academic critics, federal and state courts have almost unanimously endorsed the rule. [FN127] When the Second Circuit appeared to be sniping at the edges of Ker-Frisbie in the 1970s, [FN128] the Supreme Court broadly affirmed the Ker-Frisbie rule three times (although not in the treaty or foreign abduction contexts). [FN129] *965 Reversal of Ker-Frisbie was thus highly unlikely. In fact, even the modest strategy of distinguishing Ker on the facts, which the Alvarez-Machain lower court and dissent attempted, was soundly rejected by the majority. [FN130]

The second potential criminal law argument would have asserted that trials of abductees from other countries should be ruled invalid using the judiciary's inherent supervisory power, which allows federal courts to dismiss abusive prosecutions as a last resort. In abduction cases, commentators have called for the use of this power, defendants have invoked it, and the lower courts (including the district court in Alvarez-Machain) have alluded to it in dicta. [FN131] But no court has ever squarely relied on its supervisory power in an abduction case, [FN132] and the Supreme Court has sharply restricted the doctrine, stating that it constitutes an unwarranted extension of judicial power. [FN133] Moreover, the unsavory charges against Alvarez Machain ensured that arguments invoking the supervisory power were unlikely to find a sympathetic audience.

B. The Dissent's Turn to Rauscher

Unable to find a persuasive basis for dismissal under American criminal law, Justice Stevens turned to treaty and international law. Under United States v. Rauscher, [FN134] important protections, even if unenumerated in the text, attach once a particular rendition is governed by an extradition treaty. If the abduction of Alvarez Machain violated the extradition treaty, the Rauscher remedy of repatriations should have been provided. Under Rauscher, treaties are contractual understandings between countries which are equally binding on the Executive and the Judicial Branches. [FN135] The courts need not defer to discretionary Executive Branch acts like abduction without *966 examining alleged extradition treaty violations. Moreover, Rauscher generously construes the presumptive aim of regulating rendition, even for inconclusive treaties. [FN136] Finally, Rauscher addresses the abductee's claim without requiring protest by his asylum country, [FN137] providing the individual a desirable remedy, repatriation. [FN138] In short, reliance on Rauscher seemed to offer a very strong case for the dissent-if only it could be made to fit.

At best, however, Rauscher would only support a narrow holding in favor of Dr. Alvarez Machain, creating an exception to the Ker-Frisbie rule by favoring nationals of a country that has signed an extradition treaty with the United States. The logic of Rauscher would not extend to abductions from the seventy countries with which the United States has no extradition treaty, [FN139] nor would it reach abductions from the ship of a country that has not acceded to the Convention of the High Seas, [FN140] or instances where the defendant is lured onto an American vessel or American soil. [FN141] Rauscher might also permit abductions of stateless persons, at least those lacking official status from some national or international institution.

In addition, Rauscher's theoretical underpinnings are inconsistent with respect to the notion of customary norms. The case correctly states that treaties must be construed in accordance with customary norms, such as the specialty rule. But these customary norms also include male captus, bene detentus. [FN142] Applying customary norms to treaties allows a Trojan

horse to enter Rauscher's gates. Although Rauscher mandates a remedy for the individual, its logic compels that the opposing norm (male captus) also be considered. To escape this destructive logic, human rights law must be invoked.

Rauscher's greatest problem is its failure to define the term "treaty violation," despite its threshold requirement that such a violation occur. The Rauscher majority found it "apparent" and "very clear" from "the entire face of the treaty" that despite its conspicuous absence from the text of the Webster-Ashburton treaty, the specialty doctrine was incorporated into the treaty nonetheless. Any other result, the Court held, would violate the "manifest scope and object of the treaty." [FN143] But proving such violations is difficult where no guidelines for defining them exist. What, then, is the basis for finding a violation? The likelihood that one has occurred? The reasonableness *967 of finding a violation? How can a rule against abductions be read into a treaty when the Court interpreting the treaty is unwilling to hear arguments based on likelihood or reasonableness?

C. The Human Rights Paradigm

The dissent could have avoided Rauscher's shortcomings by relying on the authority of human rights law, which, as various amici argued, contains an emerging new norm against foreign forcible abduction. [FN144] This new norm focuses on the wrongs (abduction and trial) suffered by the individual, and differs from male captus by treating the abduction as a wrong requiring an individual remedy. Although the new norm is definitely present in modern international law, it is still unclear whether it has supplanted male captus. If the norm is firmly incorporated into American law, the dissent would have a powerful argument against abduction. Under the human rights theory, Alvarez Machain's claim would neither depend on proof of official involvement (required by the lower courts) [FN145] nor would it fail based on either the language of the treaty or Mexico's tacit consent to Ker-Frisbie.

Reliance on human rights law rather than Rauscher would provide a remedy for any abduction that occurred outside a sovereign's territory. The validity of such claims would not depend on the excessive violence of the abduction as required by the high threshold of the Toscanino test. Nor would the claim be limited to nationals of treaty partners or obscured by the alleged consent of corrupt local officials.

Most important, an individual right against abduction based in human rights law would negate the need for protest by the abductee's country. [FN146] The protest requirement is problematic because it forces the asylum state to weigh an individual's complaint against other bilateral foreign policy issues, usually to the individual's disadvantage. Under human rights law, the variables of the abduction would be irrelevant. Foreign abduction alone would be sufficient to trigger a remedy.

The human rights norm would also help to reconcile abduction claims with post-World War II public international law. This body of law has increasingly recognized that many rights belong to individuals as individuals, *968 not as members of nation-states. Foundational post-war legal texts demonstrate the centrality of individual rights. [FN147] Acknowledgement that the right not to be abducted or tried afterward lies with the individual rather than with his country would provide equal treatment of similar defendants for the differing treatment afforded by the current tiered categories of aliens. Moreover, this approach would be consistent with the individual right against abduction by one's own country, as well as with other recognized human rights such as protection against prolonged, arbitrary detention. [FN148] Finally, the human rights norms shift the focus from citizenship, treaty term, and official protest to the core issue of police behavior and the individual. In this regard, human rights law would surpass due process analysis, taking a bolder position than current conceptions of our Constitution allow.

The dissent failed to utilize the valid legal basis of human rights law to articulate its revulsion at abduction, choosing instead, like the majority, to view Alvarez-Machain primarily as a treaty case. The majority probably addressed treaties to avoid the remote possibility that foreign abductees from America's treaty partners would be "privileged." [FN149] For its part, the dissent likely focused on treaties in the hope that treaty law would provide an alternative to Ker-Frisbie, and would at least protect those persons abducted in the face of a treaty. The treaty permitted the dissent to avoid the "squishiness" of customary norms and the

Pandora's box of "controlling executive ... act s ." [FN150]
Perhaps the dissent also chose the treaty argument for the more pressing reason that other arguments were, for practical purposes, unavailable. Due process analysis, requiring a frontal assault on Ker-Frisbie, was politically impossible, and arguments grounded in human rights law have never been welcomed in American courts. With its origins in natural law theory, human rights law feels fuzzy and moralistic; because human rights law is embodied in conventions and other instruments, it strikes American judges as presumptuously positivistic. Thus, the majority relied on the treaty and Ker while the dissent focused on the treaty and Rauscher. A universe of legal issues was reduced to one treaty and two cases decided on the same day a century ago.

V. Some Practical Consequences of Alvarez-Machain

A. The Abduction Free-for-All Scenario

Critics have focused on the practical dangers of abductions in the aftermath *969 of Alvarez-Machain. Will America become a rogue nation, abducting fugitives at will? Even if we accept Executive Branch assurances that abduction will be confined to extreme cases, there could be many such seizures. A speculative American "wish-list" of persons whose extradition to the United States has been expressly refused could include: Medellin and Cali drug lords; Abu Abbas, released by Italy after the Achille Lauro hijacking and murder; Mohammad Ali Hamadi, tried in Germany for a lesser offense in lieu of trial in America for a murder committed during a hijacking; Marc Rich and Pincus Green, fugitive commodities traders; Libyan intelligence officers accused of planning the murder of Pan Am passengers over Lockerbie; and Robert Vesco, whose proposed seizure prompted the Carter Administration to restrict foreign abduction in the first place. [FN151] The list is an all-star gallery of international rogues sheltered by countries friendly, hostile, and indifferent to American interests. What will happen when an operation goes awry and local police exchange gunfire with American agents on foreign soil?
The other practical concern is the potential for abductions from America by foreign governments. [FN152] Fugitives and refugees from a variety of countries and circumstances find sanctuary in the United States. State- sponsored murders of dissidents in America by Chile and the Republic of China underscore the willingness of foreign regimes to pursue political assassination on American soil. [FN153] Would such regimes shrink from abduction? [FN154] Within days of Alvarez-Machain, the Iranian government reaffirmed its readiness to abduct Americans accused of violating Iranian law. Possible abduction targets among the Iranian emigre community or the Pahlavi family are obvious, [FN155] but not all fugitives are ousted politicians, to whom international law and Executive Branch discretion might provide heightened protection. The post-Alvarez-Machain announcement by U.K. Attorney General Sir Nicholas Ewell that the British government had despaired of obtaining John DeLorean by extradition from America illustrates the hypothetical possibilities. [FN156]
The prospect of reciprocal international lawlessness has been at the heart of criticism of Alvarez-Machain. America abducts abroad, and other countries will abduct from here. Thus, when District of Columbia U.S. Attorney Jay Stephens announced the indictment of chess champion Bobby Fischer for violating U.N. economic sanctions against Serbia, he quickly added that he did not foresee abducting Fischer. [FN157] At the logical extreme, everyone will abduct everywhere, an autarkic free-for-all in which each country grabs whomever it wants badly enough to face the political risks.
This critique entirely misapprehends the consequences of Alvarez-Machain. Although press reports immediately after Alvarez-Machain disclosed a small wave of abductions by America, this was probably the regular level of drug- related abductions, made newsworthy by the Supreme Court's decision. [FN158] As President Bush stated in the first days after Alvarez-Machain, abductions will occur only rarely. [FN159] This is not, however, because the Executive or Judicial Branches take treaties or international law seriously, but because of prudential policy considerations. The reasons are obvious: Every abduction involves spending political capital, so each operation must either be deniable or perfectly executed. Private kidnappers are also aware that if an abduction is not perfectly executed or is later

discovered, they may be extradited to face kidnapping charges. For similar prudential reasons, foreign governments are unlikely to kidnap from American soil. The prospect of American retaliation, political or military, makes abduction rarely worth the effort.
In addition, the infrequent occurrence of abductions is unlikely to unleash *971 a Doomsday scenario of reciprocal kidnappings and reprisals. The abducting country may face nominal censure, as did Israel after the Eichmann abduction. [FN160] On rare occasions the receiving state will repatriate the abductee, as the United States did after the Jaffe abduction, [FN161] or pay some form of monetary compensation. [FN162] Most often, the abducting country will stonewall or offer bland reassurances, as the United States did after Alvarez Machain's abduction. [FN163] The aggrieved state typically will accept the abduction and swallow the insult to its sovereignty, realizing that occasional abductions are rarely important enough to jeopardize international interests.
Consider the political aftermath of the Alvarez-Machain case. Mexicans in and out of government fiercely denounced the United States. [FN164] The government of Mexico called for treaty amendments, threatened to halt drug control cooperation, and filed complaints with the Organization of American States and other institutions. In addition, a Mexican patrol entered U.S. territory to arrest a fugitive without consent, perhaps in symbolic reprisal. [FN165] But the proposed free trade treaty has not been scuttled, nor have the fundamental economic and immigration relationships between the two countries been weakened.

B. The Real Significance of Alvarez-Machain: The Imperial Presidency
The real significance of Alvarez-Machain lies not in its impact on international policing, but in its effect on American law and politics. The possibility of foreign abduction by United States officials forces Americans to consider how police should be regulated, defendants treated, and the Executive Branch limited in its conduct of foreign relations. Should abductions, however few, be subject only to prudential considerations, or should they be regulated by law? If regulation is appropriate, what form should it take? How the political branches and the public respond to these questions will say much about the current configuration of American constitutionalism.

1. Restraining the Executive: the realist critique.
One possible response to the case is to reject a legal framework in favor of a "realist" approach that measures abductions only against national interest. Foreign-policy realists are appalled by the notion that international law could restrain American interests. [FN166] After all, they note, few other states, *972 especially powerful ones, are so scrupulous. Forget moralism and international law, they write (and often do when in office). Forget even the possibility acknowledged in Alvarez-Machain that, under a different treaty or clearer international norms, a state might be bound to repatriate a defendant or barred from abducting in the first place. The very notion of a state bound by normative or contractual obligations in a Hobbesian world is absurd to the realists. States should do only what they perceive as being in their best interests. Statecraft might be the business of white-shoe lawyers turned diplomats, but it is divorced from the strange and academic system called public international law. Realists and international lawyers often agree on policy, but realists reject the independent normative claims of international law, accepting it only when it makes sense from a tactical or public relations standpoint.
Since World War II, respected scholars including Hans Morgenthau and Kenneth Waltz have espoused realist analyses of international relations. [FN167] Moreover, realist diplomats, including George Kennan and Henry Kissinger, have occupied the highest American foreign policy positions. These scholars and statesmen agreed that a great power must be free to pursue its interests, although they frequently differed on how to define those interests. Legal accretions, such as the Nuremberg war crimes trials, proposals for a new international criminal court, the Third-World majoritarian United Nations, and the International Bill of Rights all arouse distrust among realists. Their skepticism turns to ridicule when confronted with more unusual claims of international law, such as the notion that peacetime spying or nuclear armament is "illegal." [FN168] So persuasive is the realist perspective that, to the chagrin of many international lawyers, even American leaders firmly

grounded in the tradition of legal-minded liberal internationalism, such as Woodrow Wilson, Franklin Roosevelt, Henry Stimson, Jimmy Carter, and Cyrus Vance, have willingly subordinated international legal concerns to diplomatic objectives and domestic political realities.

Under a realist analysis, abductions necessary to protect the national interest are perfectly appropriate. Any limits on this activity should derive from American statutory and constitutional law and the pressures of domestic public opinion and not international law, even if the latter is formally incorporated into American law. Note that realism is not the equivalent of "anything goes"; America is free to limit its own policy options through *973 domestic law. [FN169] Realism focuses on domestic restraints on American activities abroad, ignoring the external limits embodied in international law.

How should international lawyers respond? Viewing realism as the gratuitous replacement of law with gutter values is profoundly misguided. Realism's logic is too powerful for even the most idealistic statesmen to ignore. If law does not recognize power it will be marginalized, as international law has been for much of this century.

There are two substantive responses to the realist critique. First, the creation of a strong body of international law, even with its associated limitations on state sovereignty, can powerfully serve America's foreign policy interests. International law promotes stability, security, and, since World War II, human rights. The United States has strong security and economic interests in maintaining an orderly world and in achieving meaningful norms of peaceful state behavior.

Second, realism typically slights the need for meaningful restraints on Executive Branch discretion in foreign affairs, which has increased substantially since the start of World War II. In theory, realists recognize the need to proceed through constitutional channels. In practice, at least during the Cold War, their insistence that effective foreign policy required speedy and secret decisionmaking meant that their criteria for reasonable constitutional restraints were far too loose. [FN170]

One important lesson of the Vietnam War is that the Executive Branch must not be given excessive leeway in foreign affairs. The President's claim of exclusive jurisdiction over American foreign policy and the increasing secrecy surrounding that leadership threaten our commitment to a limited, constitutional government. In this context, there is ample reason to consider Alvarez-Machain a dangerous blank check for the Executive. Equally ominous is the tendency for operations like the Alvarez Machain abduction to be planned and carried out at the governmental grass-roots level. Abduction thus represents a double delegation of power: first to the Executive Branch, then to the bureaucracies of the DEA or FBI. Any possibility of meaningful oversight is lost.

Regardless of whether one is generally persuaded that broad Executive Branch discretion is dangerous, the Executive triggers oversight when it calls on the courts to resolve and legitimate events begun by extraterritorial abduction. It is preferable to abduct foreign defendants for trial than to assassinate them. Alvarez Machain won at trial, and General Noriega had a chance to win. Che Guevara had no trial and no chance. Because world *974 opinion is likely to view the trial process as a fair means of resolving issues, the Executive Branch benefits from allowing the courts to consider foreign seizures. But invoking a judicial rather than military paradigm to placate world opinion has drawbacks as well. Few judges would willingly rubber-stamp presidential foreign-policy initiatives or preside at the sham trials of abducted aliens. Furthermore, relying on the criminal model involves the possibility of acquittal, some measure of accountability to the judicial and legal communities, and adherence to rules that a disgruntled Congress can, and perhaps will, modify.

2. Reform proposals to limit abduction.

It is doubtful that the Supreme Court, having spoken on abductions in Alvarez-Machain, will have the last word. The Court held only that abduction is not prohibited by the treaty with Mexico and that courts retain jurisdiction over an abductee. Critics of this view can try to change the law. Indeed, the effort has already begun.

What are these potential reforms? According to the Court, modifying the treaty to expressly preclude abduction might suffice. Mexico supports this option, [FN171] but the Executive

Branch is unlikely to relinquish what it has just won from the Court. Mexico has also requested the extradition of Alvarez Machain's kidnappers, for which there is American precedent, [FN172] but the Executive Branch is unlikely to permit the rendition of its own employees or those who aided them.

Another means of regulating abductions is to permit abductees to file tort actions on constitutional, human rights, or common law grounds. Ker expressly mentioned this possibility. [FN173] Moreover, when the Ker-Frisbie rule appeared shaky in the 1970s, conservatives argued that accepting the sanction of civil damages was preferable to releasing the abductee. [FN174] Verdugo Urquidez and other abductees have brought civil suits, and press reports indicate that Alvarez Machain may do the same. [FN175] Recent case law, however, *975 seems to discourage foreign Bivens actions, [FN176] and even successful civil suits are unlikely to affect abduction policy. Civil liability has rarely succeeded in controlling domestic police practices; its inadequacy and that of similar alternatives is the chief justification for the exclusionary rule.

A third alternative is Executive Branch adoption of internal guidelines requiring high-level approval for any abduction. Public comments by several leading officials, however, suggest that such guidelines already exist-raising questions about their efficacy. [FN177] Although top officials certainly approved the abduction of General Noriega, it is unclear whether they were involved in the decision to abduct Alvarez Machain or others implicated in the killing of DEA Agent Camarena. More important than whether senior Executive Branch officials consider a pending abduction is what criteria they use and whether the process itself can be monitored.

As a result, critics of Alvarez-Machain have looked to Congress for reform. [FN178] One pending bill would forbid prosecution of persons abducted by U.S. officials against a treaty and with state protest. [FN179] Legislation could easily go farther, unqualifiedly forbidding foreign abduction. Some observers have even suggested that legislation expressly incorporate the international norms against seizure and the use of extraterritorial force. [FN180] Alternatively, the Federal Kidnapping Act might be amended to clarify the criminal liability of officially supported abductors-a possibility considered by the Frisbie Court. [FN181] Congress might also limit the authority of the FBI or the DEA. But any legislative strategy aimed at the Executive Branch collides with the allegedly inherent and almost limitless constitutional authority of the President to enforce the law and conduct foreign relations. [FN182] Proposals should instead focus on the courts, divesting them of jurisdiction over abductees where a treaty and foreign protest is involved, or even under *976 any circumstances. [FN183] Finally, a number of critics have used the abduction controversy to promote or revive the notion of an international criminal court with sole or concurrent jurisdiction over foreign abductees. [FN184] Regardless of the dubious merits of such a court, in the context of abduction both Congress and the American public are certain to ignore such a proposal.

Some skepticism regarding legislative remedies is in order. On a practical level, regulating police behavior is problematic at best. Courts already have trouble supervising domestic police activities. Only a "bright- line" statute banning all foreign abduction, or all abduction with our treaty partners, might end foreign kidnapping. A more permissive rule granting jurisdiction after abduction by private figures or foreign police would face inherent oversight difficulties, magnified by the fact that the activities occurred abroad. A ban forbidding only official and joint public-private kidnappings might delegate abductions to private freelancers. A law permitting abduction as a last resort, or only if certain legal findings were made, could result in pro forma claims that the required alternatives had been exhausted and the predicate facts found.

To illustrate the difficulty of regulating extraterritorial policies, consider the Mansfield Amendment to the Foreign Assistance Act of 1961. [FN185] First enacted in 1976, the Amendment sought to limit U.S. involvement in foreign drug crime enforcement. The Amendment is widely viewed as a failure, lacking sanctions or other mechanisms. Its porous terms are easily circumvented, and where it does apply, it is frequently ignored by aggressive agents. [FN186] In the Caro-Quintero drug outfit cases, including Alvarez-Machain, the Mansfield Amendment was inapplicable apparently because the investigations were related

to murder rather than drug trafficking.
Ironically, even in the absence of an effective statute, the high cost and complexity of foreign kidnapping place real constraints on discretionary abductions. [FN187] Of course, appropriation limitations will not affect private *977 bounty-hunters or the abduction of easy targets. Many seizures, however, are possible only with the intelligence and logistical support of government agencies and resources. And, as memories of the failed Iran hostage rescue demonstrate, there is no margin of error for government seizures.
Seizing even a well-connected lesser figure may cost hundreds of thousands of dollars. Dr. Alvarez Machain's abduction required the payment of $20,000 of a $50,000 promised reward, the evacuation to America of seven kidnappers and their families, weekly stipends of $6000 for the kidnappers and their families in the first two months alone, and such intangibles as favorable visa status. [FN188] The seizure of a mid-level terrorist like Lebanese hijacker Fawaz Yunis in 1988 involved five government agencies, foreign contractors, rented houses and boats, a naval communications ship, and an aircraft carrier. [FN189] Abducting a Cali drug kingpin or a major Middle Eastern terrorist chief would require even more elaborate machinations (recall the probable cost in lives and money of arresting General Noriega). The cost, complexity, and possibility of humiliating failure often might provide precisely the check on Executive Branch adventurism that the Supreme Court declined to furnish.

VI. CONCLUSION: JUSTIFIED ABDUCTIONS IN LIMITED CONTEXTS

In the previous section I joined the widespread call for regulation of foreign abduction in the form of legislation divesting the courts of jurisdiction over abductees. I asserted that an aggressive Executive Branch often claims the right to abduct without deference to legislative or judicial oversight, and I implied that the Executive Branch has exercised that discretion unwisely-the abduction of Alvarez Machain offers one prime example. I want to close by noting that some cases might exist where foreign abduction is legitimate and should be permitted under American law. While I remain fearful that the Executive Branch will often run amok given any authority to abduct, I nevertheless want to articulate my own narrow set of exceptions. Underlying these examples is the question of whether an exception can be defined with sufficient neutrality and precision to prevent the abduction of whichever fugitive is the "threat-of-the-month." Thus, the legal question ought to be not whether the president has the authority to abduct under American foreign relations law, but whether there are generally accepted principles *978 that provide meaningful guidance to the Executive Branch and legitimacy under international law when the president chooses to exercise this authority.
The analysis begins with the general rule that forcible foreign abduction violates the law. Under this presumption, Alvarez Machain's abduction would be impermissible. But there are cases where the government presents a more compelling claim. Consider, for example, seven categories that might qualify.
First, there is the unimaginably evil fugitive, typically a despotic political leader or mass killer-an Eichmann exception. [FN190] There would be some controversy over identifying precisely which lesser demons reside in this particular circle of hell: Idi Amin? Klaus Barbie? A local Serbian commander in Bosnia, circa 1992? The intent is to define a narrow class based on international legal criteria, excluding the ordinary apolitical murderer or, more pertinently, the alleged torture-murderer of a DEA agent.
A second exception might be made for a fugitive abducted from the territory of a state no longer functioning as a sovereign country. This description might have applied to Lebanon in the 1980s or to Peru at the time of the Ker case. [FN191]
A third special case is that of a fugitive who worked for, or was controlled by, an asylum state which is unlikely to surrender him. Examples include Chile's shielding nationals accused in the Letelier-Moffitt murder or Libyan protection of two officials accused in the Pan Am 103 bombing. Malefactor heads of state like General Noriega by extension would also meet this criterion.
The fourth category involves a fugitive located within a country which refuses to make good faith efforts to arrest a known defendant and bring him to justice. Many defenders of the

Alvarez Machain abduction shored their position by arguing that "the Mexicans were never going to prosecute." [FN192]

*979 A fugitive whose recovery is required by overriding national interest would be a fifth category. Of course, a category defined by state exigency is dangerously and inevitably open to abuse. Legitimate cases might include abducting an active terrorist or a spy en route to meet his handler.

The individual brought out of foreign sanctuary not by force, but by trickery, comprises the sixth case. Certain jurists have regarded "force or fraud" as equally violative of the nonabduction norm, [FN193] but persuasive distinctions can be drawn between the two cases. In luring a defendant, American enforcement neither directly violates the territorial sovereignty of the asylum state nor risks excessive violence to the abductee or third parties. Examples of defendants enticed from sanctuary include Edwin Wilson and Fawaz Yunis; multiple attempts were reportedly made to lure Alvarez Machain before his abduction. [FN194]

The final situation involves an American fugitive charged with a crime in the United States, like Frederick Ker. A permissive rule here would allow a state to abduct one of its own nationals for a crime committed within its own territory, particularly where a fair trial and conviction have already occurred.

The preceding list is intended to be illustrative of some of the strongest rationales for abduction. Nevertheless, the list underscores the difficulty of framing neutral criteria for abduction, for few of these scenarios are sufficiently limited, compelling, or legally manageable. From a realist's perspective, the second category creates an exception for a few particularly chaotic states while ignoring the reality that most non-Western states are institutionally weak and susceptible to pressure. The human rights analysis also rejects the second category, as individual protection should not depend on statist criteria. But the second category might be easily used under present political conditions to sanction abduction from almost any Andean or Central American country. The seventh category offers a dubious, inverted version of Verdugo-Urquidez, in which any American resident is abductable. The fourth category implies that forcible self-help is an appropriate response to a supposed failure to extradite or prosecute. It also implies that treaty partners are not entitled to decline to extradite their own nationals. The fourth category simply characterizes the refusal to take "no" for an answer, regardless of good faith or cooperation in other cases. [FN195] Even the persuasive first and fifth categories, designed to include genocidal killers and active, imminent *980 threats to national security, are easily expanded from Eichmann and Benedict Arnold to narcoterrorists, and even to an alleged torture-murderer of a DEA agent. Even with these limited exceptions, the general norm against abductions could easily collapse.

Any serious attempt to define permissible abduction must, however, address the possibilities of overriding humanitarian and security exigencies. Legitimate cases of national emergency do arise, albeit rarely in a secure country like ours, and accepting the international system of sovereign states implies that a sovereign retains the right to protect itself in these extreme cases. Current American law is of little help here; the Executive Branch invokes its constitutional discretion and Alvarez-Machain ignores abduction as policy, permitting jurisdiction over any abducted individual. International law, however, offers a more nuanced basis for supporting an abduction exception for heinous crimes and national emergencies. Although international law generally forbids the use of foreign force, it does permit countries to use force in self-defense, which may include anticipatory self-defense. As applied to abductions, the "emergency" self- defense rationale would permit the kidnapping of persons whose continued freedom posed a grave threat to national security (the foreign leader plotting for war against us, or the active terrorist). In such cases, abduction is a more precise, limited, and thus preferable option than the alternative of full- scale war. This rationale might also permit the abduction of the two Libyan agents implicated in the bombing of Pan Am Flight 103. [FN196]

But self-defense, under Article 51 of the United Nations Charter or other international law, has never been interpreted as a license to use lesser levels of force in the pursuit of strongly sought ends, however virtuous. [FN197] On the contrary, self-defense and related rationales

have always assumed an overwhelming exigency for which only a military response would suffice. In practice, application of these criteria is extremely controversial, but consensus on some points has formed. States do not have the right to respond to every instance of treaty breach, aggression, or criminality with forcible self-defense. Hence, the asserted "self-defense" rationale for invading Panama and removing General Noriega was singularly unpersuasive. [FN198] Similarly, a *981 country's right to launch a military response does not imply a discretionary right to police one's neighbor. The self-defense justification applies in the context of invasion and national survival, not as an attempt to ensure individual accountability for foreign crimes. Indeed, the chief problem with self-defense as applied to criminal enforcement is that the exigency inherent in national security may lead the Executive Branch to abduct suspects without sufficient legal evidence of guilt, as it did in the case of Alvarez Machain. Self-defense may justify the seizure of foreign agents, but it is unlikely to permit the apprehension of routine foreign criminals, however notorious.

A second internationally recognized rationale for abductions applies where the abductee is an especially heinous criminal. In the case of genocidal political leaders like Saddam Hussein or Slobodan Milosevic, the "humanitarian intervention" theory permits both full-scale war and the lesser response of abduction. Broader still is the theory of universal jurisdiction, which concerns the class of heinous crimes, including piracy, slave-trading, and genocide, over which all states are deemed to have jurisdiction. [FN199] Under either a humanitarian intervention or universal jurisdiction standard, countries might be permitted to secure personal jurisdiction through abduction. [FN200] The applicability of either theory would depend on the gravity of the offenses and the role of the offender. Moreover, it must distinguish between such extraordinary cases as Eichmann and Milosevic, on the one hand, and the recent American drug abductions on the other. [FN201]

But neither humanitarian intervention nor universal jurisdiction provides a narrow, airtight, and uniformly accepted list of crimes for which abduction is permissible. After all, humanitarian intervention was long in legal disfavor, precisely because of its potential breadth of application. [FN202] Universal jurisdiction is still an evolving category, the current scope of which might permit too many abductions. For example, if universal jurisdiction includes the crime of apartheid, are former South African officials abductable? Would African states have been entitled, under universal jurisdiction, to abduct American segregationist leaders, as Hannah Arendt wondered? [FN203] Our commitment to the reciprocal application of neutral principles would have been sorely strained if Governor George Wallace had been abducted or if the former Yugoslavia had kidnapped war criminal Andrij Artukovic, whose *982 extradition was delayed for thirty years because of Cold War tensions. [FN204] The jurisdictional bases of hijacking are also problematic. The act is recognized as an international crime, but only partly on the basis of universality. [FN205] Are Cubans who hijack planes to Miami fair game for abduction under the theory of universal jurisdiction? Universal jurisdiction creates a category of abductable offenses that is relatively short and morally appealing, but is still overbroad and unclear.

Another problem with abduction for universal crimes is the vast number of potential abductees and defendants. The essence of modern genocide is the use of the state apparatus and its thousands of complicitous individuals. May we abduct the assistants, the planners, the collaborators, and the suppliers who staff the state machinery? Torture is currently perpetrated in many countries. If we are serious about prosecuting universal crimes, scores of states and their leaders are fair game. But of course we have no intention of abducting any of these persons for trial. On the contrary, the United States has often supported these governments. Pursuing selective abductions and trials would expose moral inconsistency in an area of law that is supposedly grounded in moral unanimity.

At the same time, universal jurisdiction is too narrow for the apparent needs of statecraft. Almost no recent American abduction would be covered by the doctrine. Yet perhaps an exception for abductions ought to be precisely that narrow-limited to the most extraordinary defendants and circumstances. If national emergency and universal criminality are constricting tests for the state, so be it. Countries will continue to try to abduct alleged criminals; it would be convenient if the law could endorse those actions. But no foreseeable application of existing theory would characterize the alleged torturer-murderer of a drug agent

as an enemy of all mankind or as an imminent threat to American security. Nothing less would satisfy international lawyers that Dr. Alvarez Machain was abducted legally.
Despite the likelihood that humanitarian intervention and universal jurisdiction will be invoked in dubious cases, these two rationales provide powerful support, as well as a framework, for foreign abductions. In rare appropriate cases, this framework would permit the prudent pursuit of the national interest and would reconcile the extraterritorial extension of force with both widely accepted traditional international law and newer human rights norms. Equally important, utilizing humanitarian and universal *983 crimes rationales would offer a principled alternative to the present American practice, which places the entire question within presidential purview. Alvarez-Machain, whose supporters view it as a narrow ruling on jurisdictional grounds, is actually a broad delegation of the sort of power that has allowed swashbuckling presidents to act without restraint or consultation in the past. And given the inclinations of the Alvarez-Machain Court, America's conception of legality will continue to stretch as far as the abductor's grasp.

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[FN1]. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 432 (1987); Michael Wines, U.S. Cites Right to Seize Fugitives Abroad, N.Y. TIMES, Oct. 14, 1989, at 6 (discussing the CIA's Edwin Wilson and drug suspect Matta Ballesteros).

[FN2]. Alasdair Ross & Christopher Elliott, Costa Kidnap Plotters Hunt Runaway Ronnie, THE SUNDAY TELEGRAPH (London), June 28, 1992, at 2.

[FN3]. RESTATEMENT, supra note 1, § 432 rep. n.3. Other high profile political abductions are described in Paul O'Higgins, Unlawful Seizure of Persons by States, in INTERNATIONAL TERRORISM AND POLITICAL CRIMES 336 (M. Cherif Bassiouni ed., 1975). Particularly disturbing instances include Gestapo agents kidnapping Jewish refugees from Switzerland and Holland, and antebellum American slavecatchers seizing alleged runaway slaves in Canada. See KENNETH S. GREENBURG, MASTERS AND STATESMEN: THE POLITICAL CULTURE OF AMERICAN SLAVERY 117 (1985); Introduction: Canada, 1830-1865, in THE BLACK ABOLITIONIST PAPERS 4-6 (C. Peter Ripley ed., 1986); Lawrence Preuss, Kidnapping of Fugitives from Justice on Foreign Territory, 29 AM. J. INT'L L. 502 (1935).

[FN4]. See United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990) (involving the jurisdictional issues surrounding Noriega's arrest). For the entire judicial record of the Noriega case, see United States v. Noriega, 764 F. Supp. 1480 (S.D. Fla. 1991), 752 F. Supp. 1045 (S.D. Fla. 1990), 752 F. Supp. 1037 (S.D. Fla. 1990), 752 F. Supp. 1032 (S.D. Fla. 1990), 752 F. Supp. 444 (S.D. Fla. 1990), 746 F. Supp. 1548 (S.D. Fla. 1990), 683 F. Supp. 1373 (S.D. Fla. 1988).

[FN5]. Matta-Ballesteros v. Henman, 896 F.2d 255, 259-60 (7th Cir.), cert. denied, 111 S. Ct. 209 (1990); United States v. Caro-Quintero, 745 F. Supp. 599, 607-08 (C.D. Cal. 1990), rev'd on other grounds sub nom. United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992).

[FN6]. 112 S. Ct. 2188 (1992).

[FN7]. The account of the facts, which the Supreme Court accepted, is taken from the district court's evidentiary hearing of May 25, 1990 and its opinion of August 14, 1990. Caro-Quintero, 745 F. Supp. at 601-04.

[FN8]. United States v. Alvarez-Machain, 946 F.2d 1466 (9th Cir. 1991) (citing United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991), vacated, 112 S. Ct. 2986 (1992)), rev'd, 112 S. Ct. 2188 (1992).

[FN9]. Alvarez-Machain, 112 S. Ct. at 2188. After losing on the legal question of abduction, Alvarez Machain prevailed on the facts at trial. At the close of the prosecution's case, District Court Judge Edward Rafeedie acquitted Alvarez Machain of all charges, finding the government's case to be "wild speculation." Jim Newton, Judge Orders Camarena Case Defendant Freed, L.A. TIMES, Dec. 14, 1992, at A1, A12. The argument for acquittal was strengthened when the district court belatedly learned that the government had known of and withheld allegedly exculpatory information. See Judge Says US Was Told It Held Wrong Doctor in Agent's Killing, N.Y. TIMES, Dec. 17, 1992, at A27; see also Alan Dershowitz, Justice by Abduction Isn't American Justice, L.A. TIMES, Dec. 16, 1992, at A11 (suggesting abduction occurred not because Mexico might block a strong American case, but because the case was so weak). After initial attempts to further detain Alvarez Machain on immigration charges, the INS released him for repatriation to Mexico. Newton, supra. But see Robert M. Moschorak, Handling of Alvarez-Machain, L.A. TIMES, Dec. 22, 1992, at B6 (INS Director denies Alvarez Machain detained by INS but does not mention DEA or U.S. Attorney).

[FN10]. However, much of the criticism confused the Supreme Court's holding regarding jurisdiction with the desirability of abductions as a policy matter. See Malvina Halberstam, In Defense of the Supreme Court Decision in Alvarez- Machain, 86 AM. J. INT'L L. 736 (1992).

[FN11]. The columnists included Terry Eastland, Supreme Court Rightly Passes the Ball, L.A. TIMES, June 18, 1992, at B7; Bruce Fein, Victory for the Rule of Law, WASH. TIMES, June 23, 1992, at F1; Elmo Zumwalt, Jr., Limit Pursuits Beyond Borders?, WASH. TIMES, Aug. 7, 1992, at F4. Supportive editorials included WASH. TIMES, June 21, 1992, at B2.

[FN12]. See, e.g., A Bad Precedent, CHRISTIAN SCI. MONITOR, June 18, 1992, at 20; An Understanding with Mexico, WASH. POST, July 5, 1992, at C6; Peter Brandon Bayer, U.S. Supreme Court Missed By Ruling for Government, S.F. CHRON., June 19, 1992, at A27; Breaking Treaties: High Court Gives Green Light to Border Raids, SEATTLE TIMES, June 16, 1992, at A10; Comity, Not Kidnapping, WASH. POST, June 16, 1992, at A20; The Court Sanctions Kidnapping, HARTFORD COURANT, June 21, 1992, at D2; Extradition Ruling Absurd, ATLANTA CONSTITUTION, June 17, 1992, at A18; Frontier Justice, Big Time, BOSTON GLOBE, June 17, 1992, at 18; Kidnap? Sure, Says the Court, N.Y. TIMES, June 18, 1992, at 26; Shame on the Court for Blessing Global Kidnapping, NEWSDAY, June 23, 1992, at 38; see also The Collapse of the Alvarez Case, WASH. POST, Dec. 17, 1992, at A22 (welcoming the subsequent acquittal of Alvarez Machain); Two Crimes Were Committed, L.A. TIMES, Dec. 16, 1992, at A10 (same).

[FN13]. Anthony Lewis, Whatever the King Wants, N.Y. TIMES, June 21, 1992, at 17.

[FN14]. Caribbean Leaders Criticize U.S. Court Decision, Xinhua General News Service, July 3, 1992, available in LEXIS, Nexis Library, XINHUA File; Iran Head of Judiciary Condemns U.S. Supreme Court for "Kidnapping" Decision, BBC Summary of World Broadcasts, June 27, 1992, available in LEXIS, Nexis Library, BBCSWB File; Judicial Officials Condemn U.S. Supreme Court Decision on Seizure of Suspects, BBC Summary of World Broadcasts, June 23, 1992, available in LEXIS, Nexis Library, BBCSWB File; Latin America: Mexican Protests Against Second DEA Kidnapping, Inter Press Service, June 18, 1992, available in LEXIS, Nexis Library, INPRES File; Latin America: Unanimous Criticism of U.S. Supreme Court Decision, Inter Press Service, June 17, 1992, available in LEXIS, Nexis Library, INPRES File; Donald McRae & Maxwell Cohen, International Law Badly Shaken by U.S. Ruling, OTTAWA CITIZEN, July 28, 1992, at A9; Reaction to U.S. Supreme Court Decision Endorsing Right to

Kidnap Foreigners for Prosecution in U.S., NOTI SUR-SOUTH AMERICAN AND CARIBBEAN POLITICAL AFFAIRS, June 30, 1992, available in LEXIS, Nexis Library, NOTSUR File.

[FN15]. Beijing Radio Condemns U.S. Court Ruling on Foreign Suspects, BBC Summary of World Broadcasts, June 24, 1992, available in LEXIS, Nexis Library, BBCSWB File.

[FN16]. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2201 (1992) (Stevens, J., dissenting) (quoting, in part, The Apollon, 22 U.S. (9 Wheat.) 362, 371 (1824) (Story, J.)). Some critics were especially disconcerted-as Justice Stevens doubtless intended-by the fact that even South African courts have reversed prior holdings and rejected trial after abduction. See Comity, Not Kidnapping, supra note 12, at A20 (mentioning State v. Ebrahim, S. Afr. L. Rep. 8-9 (April-June 1991), reprinted in 31 I.L.M. 888 (1992)). Earlier South African law is cited in F.A. Mann, Reflections on the Prosecution of Persons Abducted in Breach of International Law, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY 407 (Yoram Dinstein ed., 1989), reprinted in F.A. MANN, FURTHER STUDIES IN INTERNATIONAL LAW 339, 340 (1990); O'Higgins, supra note 3, at 336. I thank Keith D. Nunes for help with this material.

[FN17]. The rule derives from Ker v. Illinois, 119 U.S. 436 (1886) and Frisbie v. Collins, 342 U.S. 519 (1952).

[FN18]. See Committee of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929 (D.C. Cir. 1988); Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985); Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam).

[FN19]. See Garcia-Mir v. Meese, 788 F.2d 1446 (11th Cir.), cert. denied, Ferrer-Mazorra v. Meese, 479 U.S. 889 (1986).

[FN20]. See Haitian Refugee Ctr. v. Gracey, 600 F. Supp. 396 (D.D.C. 1985).

[FN21]. 112 S. Ct. 2986 (1992).

[FN22]. See Monroe Leigh, Is the President Above Customary International Law?, 86 AM. J. INT'L L. 757 (1992); David O. Stewart, The Price of Vengeance: U.S. Feels Heat for Ruling That Permits Government Kidnapping, 78 A.B.A. J., Nov. 1992, at 50.

[FN23]. This has been done already by scholars in a variety of venues. See, e.g., Andreas F. Lowenfeld, Still More on Kidnapping, 85 AM. J. INT'L L. 655 (1991) [hereinafter Lowenfeld, Still More]; Andreas F. Lowenfeld, U.S. Law Enforcement Abroad: The Constitution and International Law, Continued, 84 AM. J. INT'L LAW 444 (1990) [hereinafter Lowenfeld, U.S. Law II]; Kidnapping Suspects Abroad: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 102d Cong., 2d Sess. (1992), available in LEXIS, Nexis Library [hereinafter Kidnapping Suspects Abroad] (covering June 22 hearings and testimony of Professors Michael J. Glennon, Andreas F. Lowenfeld, and Ralph G. Steinhardt).

[FN24]. See note 9 supra (discussing Dec. 14, 1992 acquittal).

[FN25]. See notes 1-4 supra note. Other, less well-known instances have also been hinted at in the relevant literature. See the cases collected in 6 BRITISH DIGEST OF INTERNATIONAL LAW 480-95 (Clive Parry ed., 1965); 2 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 224-28 (1942); 4 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 328-32 (1906). See also United States v. Lira, 515 F.2d 68, 72 (2d Cir.) (Oakes, J., concurring) (referring to nine abduction cases in the Second Circuit alone), cert. denied, 423 U.S. 847 (1975); Austin W. Scott, Jr., Criminal

Jurisdiction of a State over a Defendant Based upon Presence Secured By Force or Fraud, 37 MINN. L. REV. 91 (1953) (detailing frequency of domestic interstate abduction).

[FN26]. Alvarez-Machain, 112 S. Ct. at 2191; Paul O'Higgins, Unlawful Seizures and Irregular Rendition, 1960 BRIT. Y.B. INT'L L. 279, 300.

[FN27]. 119 U.S. 407 (1886).

[FN28]. Alvarez-Machain, 112 S. Ct. at 2193.

[FN29]. Id. at 2191 (citing Rauscher) (emphasis deleted).

[FN30]. Id. at 2194.

[FN31]. See id. at 2196 ("abduction ... may be in violation of general international law principles") (emphasis added); notes 50-56, 68 & 77-78 infra.

[FN32]. Alvarez-Machain, 112 S. Ct. at 2200-02 (Stevens, J., dissenting).

[FN33]. Id. at 2197, 2203 (Stevens, J., dissenting).

[FN34]. Ker v. Illinois, 119 U.S. 436, 438 (1886).

[FN35]. See Charles Fairman, Ker v. Illinois Revisited, 47 AM. J. INT'L L. 678 (1953).

[FN36]. Frisbie v. Collins, 342 U.S. 519, 522 (1952).

[FN37]. See generally United States v. Wade, 388 U.S. 218 (1967) (discussing Miranda v. State of Arizona, 384 U.S. 436 (1965); Escobedo v. State of Illinois, 378 U.S. 479 (1963); Massiah v. United States, 377 U.S. 201 (1963); Powell v. State of Alabama, 287 U.S. 45 (1932)).

[FN38]. State v. Brewster, 7 Vt. 118, 121-22 (1835); Ex parte Scott, 109 Eng. Rep. 166, 167, 9 Rev. Rep. 237 (1829). See O'Higgins, supra note 26, at 281-84 (discussing weakness of both Ker and Scott); O'Higgins, supra notes 3, at 339-41 (focusing on weakness of Scott).

[FN39]. Alvarez-Machain, 112 S. Ct. at 2197 (Stevens, J., dissenting).

[FN40]. Cook v. United States, 288 U.S. 102 (1933); Ford v. United States, 273 U.S. 593 (1927). The Solicitor General urged the Alvarez- Machain Court to adhere to Rauscher but to read it narrowly, as a case about the "specialty" doctrine rather than about remedies for individuals. Solicitor General, Oral Argument, United States v. Alvarez-Machain, Transcript at 12, 16, 18. The Court agreed with this reading. Alvarez-Machain, 112 S. Ct. at 2192.

[FN41]. Justice Miller argued that a sprinkling of lower federal court decisions, the consistent practices of the state courts, the writings of both American lawyers and international law scholars, and the law of nations all supported the "specialty" rule. Rauscher, 119 U.S. at 415-31. But a closer look yields a different view of the case. In fact, there were few extradition treaties at the time, and none mentioned the specialty doctrine. The American authors cited by Miller were of modest authority, and many of his precedents dealt with asylum rather than specialty. Most importantly, the United States strongly and consistently opposed the doctrine, and had recently concluded diplomatic face-offs with Great Britain over the doctrine in the extradition cases of Lawrence and Winslow. Id. at 415-16; 2 FRANCIS WHARTON, A DIGEST OF THE INTERNATIONAL LAW OF THE UNITED STATES, 758-98 (1886) (citing U.S. opposition). If this is so, the better view of Rauscher is that it rested on weak foundations and stands for the proposition that the publicists' idealized customary law may outweigh the consistent practice of the United States and other nations.

[FN42]. Halberstam, supra note 10, at 737 n.7. The Alvarez-Machain majority stated that Mexico was free to seek satisfaction from the Executive Branch, but insisted that the treaty was not violated and remedy was not owed as of right. 112 S. Ct. at 2196-97.

[FN43]. Solicitor General, Oral Argument, United States v. Alvarez-Machain, Transcript at 8-11 (conceding violation of international law and perhaps of treaty).

[FN44]. BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 784 (1991); Marian Nash Leich, Contemporary Practices of the United States Relating to International Law, 78 AM. J. INT'L L. 200, 207 (1984) (containing letters of Secretary of State and Attorney General seeking Jaffe's early release).

[FN45]. See Lawrence Preuss, Settlement of the Jacob Kidnapping Case (Switzerland-Germany), 30 AM. J. INT'L L. 123 (1936).

[FN46]. See Matta-Ballesteros v. Henman, 896 F.2d 255 (7th Cir.), cert. denied, 111 S. Ct. 209 (1990); United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990).

[FN47]. Kidnapping Suspects Abroad, supra note 23, at 1-1 (testimony of Hon. Abraham Sofaer); see also Jacqueline A. Weisman, Extraordinary Rendition: A One-Way Ticket to the U.S. ... Or Is It?, 41 CATH. U. L. REV. 149 (1991).

[FN48]. See text accompanying notes 29-31 supra.

[FN49]. This theme is illustrated by Lewis, supra note 13. The critique was anticipated by such writers as Lowenfeld in Still More, supra note 23, at 661.

[FN50]. United States v. Alvarez-Machain, 112 S. Ct. 2188, 2193-94 (1992).

[FN51]. See, e.g., Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221, 241 (1986) (ruling sanctions under Pelly and Packwood Amendments optional); Sen. Daniel Patrick Moynihan, Supreme Court's Kidnapping Ruling Is Manifestly Wrong, ROLL CALL, July 27, 1992, at 5 (citing Alvarez-Machain, and treaties with Nicaragua and Panama); United States: Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, DEP'T ST. BULL., Mar. 1985, at 64 [hereinafter Nicaragua Statement] (repudiating compulsory jurisdiction of the International Court of Justice).

[FN52]. Alona E. Evans, Acquisition of Custody over the International Fugitive Offender-Alternatives to Extradition: A Survey of United States Practice, 1966 BRIT. Y.B. INT'L L. 77, 78-88, 90-91; O'Higgins, supra note 3, at 337.

[FN53]. O'Higgins, supra note 26, at 300.

[FN54]. See, e.g., Brief of Amicus Curiae Minnesota Lawyers International Human Rights Committee in Support of Respondent at 6, 11, 18, United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992) (No. 91-712); Brief Amicus Curiae of Allard K. Lowenstein International Human Rights Clinic and the Center for Constitutional Rights in Support of Respondent at 9-15, 36-46, United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992) (No. 91-712) [hereinafter Lowenstein Amicus Brief]; Brief Amicus Curiae of the Lawyers Committee for Human Rights in Support of Affirmance, at 6-16, United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992) (No. 91-712) [hereinafter Lawyers Committee Amicus Brief].

[FN55]. Alvarez-Machain, 112 S. Ct. at 2194. The majority makes no mention whether Mexico was also entitled to infer from the 1905-06 Martinez episode that kidnappers would be returned to face justice in Mexico, as kidnapper Antonio Felix was. See Breaches By Private

Persons, 2 HACKWORTH DIGEST, supra note 25, § 152, at 321 (1941).

[FN56]. Alvarez-Machain, 112 S. Ct. at 2194, 2196.

[FN57]. Id. at 2199 n.14 (Stevens, J., dissenting) (citing Brief of the Government of Canada as Amicus Curiae in support of Respondent, United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992) (No. 91-712)); see also Stephen Bindman, McDougall Warns U.S. on Kidnapping, CALGARY HERALD, June 17, 1992, at B7 (reporting strong warning of Canadian External Affairs Minister rejecting abduction). For this reason, some authorities suggest that amending a treaty expressly to prohibit abduction might wrongly imply that the practice is otherwise legal. Kidnapping Suspects Abroad, supra note 23, at 5-1 (transcription of June 22, 1992 testimony of Professor Andreas F. Lowenfeld).

[FN58]. Alvarez-Machain, 112 S. Ct. at 2199 (Stevens, J., dissenting).

[FN59]. ARNOLD DUNCAN MCNAIR, THE LAW OF TREATIES 364-90 (1961).

[FN60]. Vienna Convention on the Law of Treaties, May 22, 1969, art. 31(3) 8 I.L.M. 679, 696 (1969).

[FN61]. See RESTATEMENT, supra note 1, § 325(1), cmt. g, rep. n.4 (1987).

[FN62]. See O'Higgins, supra note 3, at 345 (listing the various means of rendition, all characterized by the active and consensual participation of the territorial state).

[FN63]. See United States v. Rauscher, 119 U.S. 407, 434-35 (1886) (Waite, C.J., dissenting).

[FN64]. Extraterritorial Apprehension By the Federal Bureau of Investigation, 4B Op. Off. Legal Counsel 543, 547 n.13 (1980) [hereinafter Extraterritorial Apprehension].

[FN65]. Appellee's Supplemental Brief § 1, United States v. Verdugo- Urquidez, 939 F.2d 1341 (9th Cir. 1991) (No. 88-5462).

[FN66]. To date, the only academic supporter of this view of treaty interpretation vigorously attacks the results of Alvarez-Machain on customary law grounds. Jacques Semmelman, International Decisions, United States v. Alvarez-Machain, 86 AM. J. INT'L L. 811, 817 (1992).

[FN67]. See, e.g., Leigh, supra note 22, at 758-60; Steven M. Schneebaum, The Supreme Court Sanctions Transborder Kidnapping in United States v. Alvarez-Machain: Does International Law Still Matter?, 18 BROOK. J. INT'L. L. 303 (1992); Semmelman, supra note 66, at 817-19.

[FN68]. Alvarez-Machain, 112 S. Ct. at 2196.

[FN69]. J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 162 (Humphrey Waldock ed., 6th ed. 1963); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 280, 284 (2d ed. 1973).

[FN70]. RESTATEMENT, supra note 1, § 432 rep. n.2; BROWNLIE, supra note 69, at 308.

[FN71]. M. Cherif Bassiouni, Unlawful Seizures of Persons By States as Alternatives to Extradition, in INTERNATIONAL TERRORISM AND POLITICAL CRIMES 343, 356-57 (M. Cherif Bassiouni ed., 1975); Michael J. Glennon, State- Sponsored Abduction: A Comment on United States v. Alvarez-Machain, 86 AM. J. INT'L L. 746, 749-50 (1992).

[FN72]. The Paquete Habana, 175 U.S. 677, 700 (1900).

[FN73]. Id. at 700.

[FN74]. Lowenstein Amicus Brief, supra note 54, at 4-8, 19-32 (combining lower-official and unilateral-reinterpretation arguments); Brief Amicus Curiae of the International Human Rights Law Group, at 26-28, United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992) (No. 91-712) (discussing DEA enabling act not "controlling legislative act" and lower-official argument) [hereinafter Law Group Amicus Brief]; Lawyers Committee Amicus Brief, supra note 54, at 4-5; see also United States v. Caro-Quintero, 745 F. Supp. 599, 603 (C.D. Cal. 1990) (noting that the deputy director of the DEA had authorized the abduction plans), rev'd on other grounds sub nom. United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992).

[FN75]. See Glennon, supra note 71, at 750-51; Leigh, supra note 22, at 759- 62; Kidnapping Suspects Abroad, supra note 23, at 6-1 (prepared statement and June 22, 1992 testimony of Prof. Michael Glennon). See generally May the President Violate Customary International Law? (cont'd), 81 AM. J. INT'L L. 371 (1987) (offering the views of Profs. Frederick L. Kirgis, Jr., Anthony D'Amato, and Jordan J. Paust).

[FN76]. See Garcia-Mir v. Meese, 788 F.2d 1446, 1453-55 (11th Cir.), cert. denied, Ferrer-Mazorra v. Meese, 479 U.S. 889 (1986) (holding that acts of the Attorney General are controlling Executive Branch acts); F.B.I. Authority to Seize Suspects Abroad: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 101st Cong., 1st Sess., at 6-7 (1989) [hereinafter F.B.I. Authority to Seize Suspects Abroad] (testimony of then Assistant Attorney General William Barr); see also RESTATEMENT, supra note 1, § 115 n.3 (explaining that the President has authority to disregard international law or agreements); Halberstam, supra note 10, at 741.

[FN77]. The Supreme Court's apparent rejection of customary law claims was addressed by the Ninth Circuit on remand. See United States v. Alvarez- Machain, 971 F.2d 310, 311 (9th Cir. 1992) (concluding that customary-law claims are precluded by Supreme Court), modified, No. 90-50459, 1992 U.S. App. LEXIS 28367 (1992). This view was criticized in Semmelman, supra note 66, at 819-20 (written before the Nov. 3, 1992 modification of order).

[FN78]. Alvarez-Machain, 112 S. Ct. at 2195-97.

[FN79]. Statute of the International Court of Justice, art. 38(1)(b), reprinted in LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 35 (2d ed. 1986).

[FN80]. RESTATEMENT, supra note 1, § 102(2); Alvarez-Machain, 112 S. Ct. at 2195-96.

[FN81]. See, e.g., The Nereide, 13 U.S. (9 Cranch) 388 (1815); Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804). For similar arguments in eighteenth century England, see Triquet v. Bath, 97 Eng. Rep. 936, 938, 3 Burr. 1478, 1481 (K.B. 1764); Barbuit's Case, Cas. t. Talbot, 281 (Chanc. 1735), cited in BRIERLY, supra note 69, at 86.

[FN82]. DANIEL GEORGE LANG, FOREIGN POLICY IN THE EARLY REPUBLIC: THE LAW OF NATIONS AND THE BALANCE OF POWER 1-12 (1985).

[FN83]. Oscar Schachter, International Law in Theory and Practice, in HENKIN ET AL., supra note 79, at 36; see also Louis Henkin, International Law as Law in the United States, 82 MICH. L. REV. 1555, 1555-57 (1984) (discussing different theories by which international law was incorporated into nineteenth century American law); Ruth Wedgwood, The Revolutionary Martyrdom of Jonathan Robbins, 100 YALE L.J. 229, 239 n.26 (1990) (explaining the Supreme Court's natural law attitude toward prize law).

[FN84]. HENKIN ET AL., supra note 79, at 70.

[FN85]. Phillip R. Trimble, A Revisionist View of Customary International Law, 33 UCLA L. REV. 665, 707-30 (1986) (referring to the history and development of customary international law).

[FN86]. Id. at 684-702; see also id. at 723-25 (arguing that courts are correct in sensing that modern customary law is fundamentally different from the older law of nations).

[FN87]. 630 F.2d 876 (2d Cir. 1980).

[FN88]. See, e.g., Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), aff'd on other grounds, 654 F.2d 1382 (10th Cir. 1981).

[FN89]. HENKIN ET AL., supra note 79, at 1023; Natalie Hevener Kaufman & David Whiteman, Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment, 10 HUM. RTS. Q. 309 (1988). But see FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 400-02 (1990) (reading the same body of documents as implying that the U.S. typically does join human rights instruments).

[FN90]. See Nicaragua Statement, supra note 51, at 64.

[FN91]. Alvarez-Machain, 112 S. Ct. at 2196.

[FN92]. Halberstam, supra note 10, at 741 (alluding to broad presidential powers).

[FN93]. See also Johnson v. Eisentrager, 339 U.S. 763, 789 (1950); United States v. Noriega, 746 F. Supp. 1506, 1538-39 (S.D. Fla. 1990). But see United States v. Verdugo-Urquidez, 939 F.2d 1341, 1357-58 (9th Cir. 1991) (rejecting political question analysis in criminal case), vacated, 112 S. Ct. 2986 (1992).

[FN94]. 478 U.S. 221 (1986); see also Eain v. Wilkes, 641 F.2d 504, 513-24 (7th Cir.), cert. denied, 454 U.S. 894 (1981). Claiming nonjusticiability and reaching the merits are not the only strategic alternatives; doctrines such as standing have also been used. See Committee of United States Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 933-34 (D.C. Cir. 1988); NEWMAN & WEISSBRODT, supra note 89, at 596.

[FN95]. 369 U.S. 186, 211, 217 (1962).

[FN96]. See Pauling v. McNamara, 331 F.2d 796 (D.C. Cir. 1963) (arguing that the right to conduct weapons tests is an Executive prerogative not reviewable by courts), cert. denied, 384 U.S. 933 (1964).

[FN97]. See Greenham Women Against Cruise Missiles v. Reagan, 591 F. Supp. 1332 (S.D.N.Y. 1984) (calling missile deployment a nonjusticiable political question), aff'd, 755 F.2d 34 (2d Cir. 1985).

[FN98]. See Schlesinger v. Holtzman, 414 U.S. 1321 (1973); DaCosta v. Laird, 471 F.2d 1146 (2d Cir. 1973).

[FN99]. See Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam) (holding that U.S. presence in El Salvador is a nonjusticiable political question).

[FN100]. Moreover, the Alvarez-Machain Court would have had difficulty characterizing the abduction as a high-level "political question" touching foreign policy, because some descriptions of the abduction portray it as the work of autonomous local agents, rather than

of the President and his senior advisors. See Lowenstein Amicus Brief, supra note 54, at 8; see also Garcia-Mir v. Meese, 788 F.2d 1446, 1454-55 (11th Cir.), cert. denied, Ferrer-Mazorra v. Meese, 479 U.S. 889 (1986) (distinguishing between acts of President and senior officials, on the one hand, and lesser Executive Branch agents, on the other).

[FN101]. See, e.g., Plyler v. Doe, 457 U.S. 202 (1982) (holding that illegal alien may claim benefit of Equal Protection Clause); Reid v. Covert, 354 U.S. 1 (1957) (ruling that citizen abroad has right to be tried by civilian court); Johnson v. Eisentrager, 339 U.S. 763 (1950) (holding that nonresident enemy alien has no access to courts in wartime and no habeas right).

[FN102]. 494 U.S. 259 (1990).

[FN103]. Id. at 278 (Kennedy, J., concurring).

[FN104]. Id. at 264-74.

[FN105]. Id. at 264-70.

[FN106]. Compare id. at 271-72 (stating that involuntary presence in the United States does not supply a substantial connection) with id. at 279 (Stevens, J., concurring) (arguing that involuntary presence does qualify aliens as among the "people" entitled to Fourth Amendment protection). Green-card status, which Verdugo Urquidez possessed, might be precisely the sort of "substantial connection ... with this country" that the Chief Justice suggested. Id. at 271.

[FN107]. The political Right never wanted to extend rights abroad. Thirteen years ago, one prominent scholar deployed a Verdugo-Urquidez-type argument to oppose recognizing other constitutional claims of aliens in a variety of cases, including those involving foreign abduction. Paul B. Stephan III, Constitutional Limits on International Rendition of Criminal Suspects, 20 VA. J. INT'L L. 777, 778-91 (1980). For its part, the post-Vietnam Left has long felt self-conscious about exporting American political notions, thinking that such notions smacked of U.S. intervention in South Vietnam, Nicaragua, Angola, and so on. For both Left and Right, Verdugo-Urquidez embodies a restrained vision of American rights. For the Left, Verdugo-Urquidez has the added benefit of potentially undermining Frisbie on the permissibility of domestic abductions.

[FN108]. As required by the 1980 opinion of the Department of Justice. See Extraterritorial Apprehension, supra note 64, at 544, 553.

[FN109]. See note 76 supra. Despite congressional subpoena, an unclassified June 1989 opinion by the Office of Legal Counsel endorsing U.S. authority to carry out extraterritorial seizures still had not been released or published at the time of Alvarez-Machain, and the November 8, 1989 Subcommittee hearings remained the only official explanation offered for the executive's policy. See Kidnapping Suspects Abroad, supra note 23, at 1-1 (statement of Chairman Edwards that Justice Department still refused to make available the unclassified June 1989 opinion); see also Lowenfeld, Still More, supra note 23, at 661 (attributing Department's failure to disclose opinion to embarrassment). The substance of the opinion, as described in the 1989 hearing, met widespread criticism. See, e.g., Leigh, supra note 22, at 758. For a rare instance of support, see Theodore C. Jonas, International "Fugitive Snatching" in U.S. Law: Two Views from Opposite Ends of the Eighties, 24 CORNELL INT'L L.J. 521, 538-62 (1991). As this article goes to press, the Department of Justice has finally published the June 21, 1989 opinion, along with an also withheld November 3, 1989 opinion on the extraterritorial use of the military for civil enforcement. See Authority of the Federal Bureau of Investigation to Override Customary or Other International Law in the Course of Extraterritorial Law Enforcement Activities, 1989 Prelim. Print, Op. Off. Legal Counsel 195 (June 21, 1989);

Extraterritorial Effect of the Posse Comitatus Act, 1989 Prelim. Print, Off. Legal Counsel 387 (Nov. 3, 1989), both published under January 15, 1993 cover. I thank John McGinnis for his help in finding these references after their publication, although he is in no way responsible for my inferences and conclusions.

[FN110]. See, e.g., Matta-Ballesteros v. Henman, 896 F.2d 255, 259-60 (7th Cir.), cert. denied, 111 S. Ct. 209 (1990); Stephan, supra note 107, at 795.

[FN111]. See United States v. Lira, 515 F.2d 68, 70-71 (2d Cir.), cert. denied, 423 U.S. 847 (1975); see also Lowenfeld, U.S. Law II, supra note 23, at 454-59 (discussing the problems of American and foreign police officials working in conjunction).

[FN112]. 232 U.S. 383 (1914).

[FN113]. 367 U.S. 643 (1961); see also Lowenfeld, U.S. Law II, supra note 23, at 454-57.

[FN114]. Elkins v. United States, 364 U.S. 206, 208 (1960) (obtaining evidence through state violations of Fourth Amendment treated same as if federal violation); Lustig v. United States, 338 U.S. 74, 75-80 (1949) (state agent acting at direction of federal official held to federal standard).

[FN115]. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 3.1(h), at 117-19 (2d ed. 1992).

[FN116]. See, e.g., United States v. Caro-Quintero, 745 F. Supp. 599, 605-06 (C.D. Cal. 1990) (Alvarez Machain's allegations of mistreatment insufficient because (1) not reciting acts of sufficient barbarity, and (2) not credible), rev'd on other grounds sub nom. United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992); United States v. Yunis, 681 F. Supp. 909, 919-21 (D.D.C. 1988) (surveying cases where torturous activity insufficiently outrageous to warrant dismissal), aff'd, 924 F.2d 1086 (D.C. Cir. 1991).

[FN117]. Yunis, 681 F. Supp. at 919. Toscanino is discussed at note 128 infra.

[FN118]. Either because they committed a domestic crime and fled, like Ker, or because they committed an act abroad that was part of a domestic crime, like some of Alvarez Machain's alleged associates.

[FN119]. Ironically, the common law world was a latecomer to proscribing extraterritorial acts. BRIERLY, supra note 69, at 299-303 (commenting that extraterritorial jurisdiction is usual outside common law world); WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 261-63 (A. Pearce Higgins ed., 8th ed. 1924) (explaining that extraterritoriality common but of dubious legality); 1 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 147, at 282-85 (Arnold D. McNair ed., 4th ed. 1928) (criticizing extraterritorial jurisdiction). Common lawyers distrusted the extraterritorial pretensions of the civil law countries, but acknowledged that extraterritoriality was at least consistent with the Europeans' reluctance to extradite their own nationals. Rather than extradite, the Europeans claimed the right to try their nationals for extraterritorial crimes. 1 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 330, at 699 (Hersch Lauterpacht ed., 8th ed. 1955); G. Marston, U.K. Materials on International Laws, 1990 BRIT. Y.B. INT'L L. 523. America's early efforts at extraterritorial prescription addressed only simple trans-border crime, United States v. Noriega, 746 F. Supp. 1506, 1512-13 (S.D. Fla. 1990); RESTATEMENT, supra note 1, § 402(1)(c) & cmt. d, and business crime (chiefly antitrust), the latter to the annoyance of our European allies; see United States v. Aluminum Co. of Am., 148 F.2d 416, 443-44, 448 (2d Cir. 1945); RESTATEMENT, supra note 1, § 415. Jurisdiction in these areas was based on various formulations of "effects" or "objective territoriality." RESTATEMENT, supra note 1, § 402 rep. n.2, § 403 rep. n.1. As recently as 1968, one

distinguished observer could entitle her relevant discussion Exemptions from Territorial Jurisdiction: Extraterritorial Jurisdiction, A Disappearing Institution. 6 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 278 (1968). But over the past two decades, federal criminal law has come to include other extraterritorial acts with only tenuous links to this nation. Andreas F. Lowenfeld, U.S. Law Enforcement Abroad: The Constitution and International Law, 83 AM. J. INT'L LAW 880, 884-92 (1989).

[FN120]. Hostile foreign reaction is illustrated by L.H. Legaut, Canadian Practice in International Law During 1983: At the Department of External Affairs, 1984 CANADIAN Y.B. INT'L L. 321, 321-24; L.H. Legaut, Canadian Practice in International Law During 1982: At the Department of External Affairs, 1984 CANADIAN Y.B. INT'L L. 302, 302-05. The legal responses to American antitrust extraterritoriality are surveyed in David J. Gerber, Beyond Balancing: International Law Restraints on the Reach of National Laws, 10 YALE J. INT'L L. 185, 187-88, 219-20 (1984). American extraterritorial jurisdiction is aggressively supported in Russell J. Weintraub, The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach, 70 TEX. L. REV. 1799 (1992).

[FN121]. RESTATEMENT, supra note 1, § 402 cmt. h. In one case, Fawaz Yunis, a Lebanese national who hijacked a Jordanian airliner on the ground in Beirut, was arrested in international waters and convicted of air piracy by an American court on grounds that three of the passengers were A mericans. United States v. Yunis, 924 F.2d 1086, 1090-93 (D.C. Cir. 1991); Lowenfeld, supra note 119, at 880-81; see also Steven Emerson, Should We Extradite Sheik Obeid?: Despite Legal Precedent Bush Is Slow to Act, WASH. POST, Aug. 6, 1989, at B2.

[FN122]. See United States v. Felix-Gutierrez, 940 F.2d 1200, 1202-06 (9th Cir. 1991).

[FN123]. United States v. Verdugo-Urquidez, 494 U.S. 259, 277-78 (Brennan, J., dissenting).

[FN124]. See United States v. Alvarez-Machain, 112 S. Ct. 2188, 2191 n.3 (1992) (noting earlier decision).

[FN125]. In Professor Henkin's words:
Ker, like another infamous case with which it is sometimes grouped, the Chinese Exclusion case-its very title embarrassing-is a relic from our Middle Ages, our years of acute xenophobia, before we became a world power, before the war against Hitler, before the UN Charter, before human rights. We ought to be ashamed to recall those cases, let alone reaffirm them.
Louis Henkin, Will the U.S. Supreme Court Fail International Law? , NEWSL. OF THE AM. SOC'Y OF INT'L L., Aug.-Sept. 1992, at 2.

[FN126]. See text accompanying note 38 supra.

[FN127]. See, e.g., State v. Stone, 294 A.2d 683, 692-96 (Me. 1972); State v. Moore, 43 Del. 509, 512-15, 50 A.2d 791, 792-94 (1946).

[FN128]. United States v. Alvarez-Machain, No. 90-50459, 1992 U.S. App. LEXIS 16816 (9th Cir. Nov. 3, 1992) (keeping alive the possibility of a Toscanino exception). United States v. Toscanino, 500 F.2d 267 (2d Cir.), reh'g denied, 504 F.2d 1380 (2d Cir. 1974), held that due process required the court to divest itself of jurisdiction over the defendant, an Italian citizen abducted, tortured, and brought to the United States by Uruguayan and Brazilian police acting as U.S. officials. Id. at 269-70, 275. The court reasoned that the Ker-Frisbie doctrine could not be reconciled with the Supreme Court's due process holdings, as embodied in Miranda v. Arizona, 384 U.S. 436 (1966), Wong Sun v. United States, 371 U.S. 471 (1963), Mapp v. Ohio, 367 U.S. 643 (1961), and Silverman v. United States, 365 U.S. 505 (1961). Toscanino, 500 F.2d at 271-76. On remand, the district court found that Toscanino had not

proven facts within the Toscanino exception. 398 F. Supp. 916 (E.D.N.Y. 1975). Later courts have limited Toscanino's application to cases where the abductee was tortured or otherwise treated so as to "shock the conscience." See United States v. Valot, 625 F.2d 308, 309-10 (9th Cir. 1980); United States v. Lira, 515 F.2d 68, 70-71 (2d Cir.), cert. denied, 423 U.S. 847 (1975); United States ex rel. Lujan v. Gengler, 510 F.2d 62, 64-66 (2d Cir.), cert. denied, 421 U.S. 1001 (1975); see also United States v. Pelaez, 930 F.2d 520, 525 (6th Cir. 1991); United States v. Yunis, 924 F.2d 1086, 1092-93 (D.C. Cir. 1991) (no known case in which facts found to fit within Toscanino exception).

[FN129]. INS v. Lopez-Mendoza, 468 U.S. 1032, 1039-40 (1984) (holding alien's illegal arrest "had no bearing" on subsequent deportation hearing); United States v. Crews, 445 U.S. 463, 474 (1980) (finding illegal arrest does not void subsequent hearing); Gerstein v. Pugh, 420 U.S. 103, 119 (1975); see also Toscanino, 500 F.2d at 275-76.

[FN130]. Compare Alvarez-Machain, 112 S. Ct. at 2192-93 (facts governed by Ker-Frisbie) with id. at 2197, 2203 (Stevens, J., dissenting) and United States v. Caro-Quintero, 745 F. Supp. 599, 604-07 (C.D. Cal. 1990) (both arguing that treaty breach distinguishes case from Ker-Frisbie), rev'd sub nom. United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992).

[FN131]. Caro-Quintero, 745 F. Supp. at 615 (declining to reach supervisory claim), rev'd sub nom. United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992), on remand No. 90-50459, 1992 U.S. App. LEXIS 10816 (Nov. 3, 1992) (declining again to reach supervisory claim); see also United States v. Lira, 515 F.2d 68, 73 (2d Cir.) (Oakes, C.J., concurring) ("the Government ... is by these repeated abductions inviting exercise of [the court's] supervisory power in the interest of ... preserving respect for law"), cert. denied, 423 U.S. 847 (1975); Jonathan Gentin, Government-Sponsored Abduction of Foreign Criminals Abroad: Reflections on United States v. Caro- Quintero %iand the Inadequacy of the Ker-Frisbie Doctrine, 40 EMORY L.J. 1227, 1246-52 (1991).

[FN132]. But see Gentin, supra note 131, at 1246-52 (describing supervisory power as "a light that still offers hope").

[FN133]. See United States v. Williams, 112 S. Ct. 1735, 1740-42 (1992) (rejecting use of supervisory power to proscribe certain prosecutorial conduct before grand jury); United States v. Hasting, 461 U.S. 499, 505-07 (1983) (rejecting use of supervisory power if error harmless); United States v. Payner, 447 U.S. 727, 733 (1980) (invoking supervisory power "would enable courts to exercise a standardless discretion in their application of the exclusionary rule"); Hampton v. United States, 425 U.S. 484, 489-91 (1976).

[FN134]. 119 U.S. 407 (1886).

[FN135]. Id. at 418-19, 430.

[FN136]. In fact, the extradition provision before the Rauscher Court was brief and never explicitly mentioned "specialty." Id. at 420, 422.

[FN137]. Id. at 424, 430.

[FN138]. Id.

[FN139]. 18 U.S.C. § 3181 (1988 & Supp. II 1990) lists all of the nations with which the U.S. has extradition treaties in force.

[FN140]. Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82; see also United States v. Cadena, 585 F.2d 1252, 1259-61 (5th Cir. 1978) (denying relief under Convention where defendant and defendant's vessel from nonsignatory countries), overruled

by United States v. Williams, 617 F.2d 1063 (5th Cir. 1980).

[FN141]. United States v. Yunis, 681 F. Supp. 909, 915-16 (D.D.C. 1988) (finding deception and forcible seizure of defendant in international waters constitutional), aff'd, 924 F.2d 1086 (D.C. Cir. 1991).

[FN142]. See note 70 supra and accompanying text.

[FN143]. United States v. Rauscher, 119 U.S. 407, 420-22 (1886).

[FN144]. Law Group Amicus Brief, supra note 74, at 4-12; Louis Henkin, Professor Henkin Replies, AM. SOC'Y INT'L L. NEWSL., Jan.-Feb. 1993, at 6; see also RESTATEMENT, supra note 1, § 432 rep. n.1; Bassiouni, supra note 71, at 361-63; Clare E. Lewis, Unlawful Arrest: A Bar to the Jurisdiction of the Court, or Mala Captus Bene Detentus? Sidney Jaffe: A Case in Point, 28 CRIM. L.Q. 341, 365-67 (1986) (discussing human rights norm in Canada against abduction and effects of Charter); Lowenfeld, U.S. Law II, supra note 23, at 474; Mann, supra note 16, at 351-52.

[FN145]. See United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991), vacated, 112 S. Ct. 2986 (1992); United States v. Caro-Quintero, 745 F. Supp. 599, 603-04, 609 (C.D. Cal. 1990), rev'd on other grounds sub nom. United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992).

[FN146]. Currently, official protest from the abductee's state gives the individual derivative standing. Rauscher did not require official protest, but since that time official protest has been inferred from Ker and has been taken as a prerequisite to an abduction claim. See, e.g., Matta-Ballesteros v. Henman, 896 F.2d 255, 259-60 (7th Cir.), cert. denied, 111 S. Ct. 209 (1990); United States ex rel. Lujan v. Gengler, 510 F.2d 62, 66-67 (2d Cir.), cert. denied, 421 U.S. 1001 (1975); Caro-Quintero, 745 F. Supp. at 613.

[FN147]. See, e.g., RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS (2d. ed. 1990).

[FN148]. RESTATEMENT, supra note 1, § 702(e) & cmt. h; Henkin, supra note 144, at 6.

[FN149]. A possibility raised by the Solicitor General in oral argument. Solicitor General, Oral Argument, United States v. Alvarez-Machain, Transcript at 15.

[FN150]. The Paquete Habana, 175 U.S. 677, 700 (1900); see Edwin D. Dickinson, Jurisdiction Following Seizure or Arrest in Violation of International Law, 28 AM. J. INT'L L. 231, 241 (1934); O'Higgins, supra note 26, at 300 (criticizing American distinction between breaches of treaties and of customary law).

[FN151]. THEY WENT THATAWAY: THE STRANGE CASE OF MARC RICH AND PINCUS GREEN, H.R. REP. NO. 537, 102d Cong., 2d Sess. (1992); Lou Cannon, Kohl Rejects Request By Reagan, WASH. POST, June 11, 1987, at A1, A28; Gordon Witkin, Who Needs Grabbing?, U.S. NEWS & WORLD REP., June 29, 1992, at 18. A proposal to abduct Vesco prompted the 1980 opinion of the Department of Justice that foreign abductions were against international law and outside of the authority of the FBI. That determination was repudiated by the 1989 Department opinion, see notes 76 & 109 supra, and by the Alvarez-Machain decision.

[FN152]. Kidnapping Suspects Abroad, supra note 23, at 8-1 (remarks of Rep. Schroeder and testimony of Prof. Glennon); Lawyers Committee Amicus Brief, supra note 54, at 5; see also Comity, Not Kidnapping, supra note 16, at A20 (describing the decision as "most dangerously inviting retaliation"); Frank J. Kendrick, Way Above the Law, WASH. POST, June 27, 1992, at A18 (letter citing U.S. refusal to extradite John Hull to Costa Rica); Shame on the Court, supra note 12, at 38 (characterizing United States as "international outlaw").

[FN153]. See Liu v. Republic of China, 892 F.2d 1419, 1421-23 (9th Cir. 1989), cert. dismissed, 497 U.S. 1058 (1990); Letelier v. Republic of Chile, 748 F.2d 790, 791 (2d Cir. 1984), cert. denied, 471 U.S. 1125 (1985); see also Lin Jenkins & William Cash, Waite Agent Named as Prime Suspect in Family Death Riddle, THE TIMES (LONDON), Nov. 9, 1992, at 3 (examining the possibility of "Arab hitmen" in San Diego murders); Scholar's Death Remains a Mystery, N.Y. TIMES, Jan. 17, 1993, at A27 (speculating about Romanian government's involvement in murder of emigre in Chicago); Ross Terrill, Death of a Triple Agent, WASH. POST BOOK WORLD, Jan. 10, 1993, at 9 (reviewing DAVID E. KAPLAN, FIRES OF THE DRAGON: POLITICS, MURDER, AND THE KUOMINTANG (1992) (providing background of Liu murder)).

[FN154]. Political abductions have occurred in the United States, although if they led to secret trial or summary execution abroad, they remain unknown to the American public. See, e.g., Bassiouni, supra note 71, at 349 n.17 (referring to alleged abduction of de Galindez by Trujillo regime); Evans, supra note 52, at 89 n.3.

[FN155]. See S. Res. 319, 102d Cong., 2d Sess. (1992); William Scally, U.S. Officials Defend Right to Grab Criminals Overseas, REUTERS, Nov. 8, 1989, BC Cycle, available in LEXIS, Nexis Library, REUTER File. (quoting Rep. Don Edwards).

[FN156]. See Rowern Dore, No British Extradition for DeLorean-Attorney General, PRESS ASSOC. NEWSFILE, July 1, 1992. For a recent example of abduction by the British, see R. v. Horseferry Road Magistrates' Court, ex parte Bennett, T.L.R. 430 (Q.B. 1992); Duncan Campbell, Clarke Pressed on Gagging Order in "Kidnap Intrigue", GUARDIAN, Dec. 3, 1992, at 4 (abduction and prolonged detention questioned by Labor Shadow Home Secretary).

[FN157]. Michael York & Joseph McLellan, Chess Star Indicted for Ignoring Sanctions, WASH. POST, Dec. 16, 1992, at A23.

[FN158]. See, e.g., NOTIMEX MEXICAN NEWS SERVICE, June 27, 1992 (FBI abducts two Colombians from Venezuela); NOTIMEX MEXICAN NEWS SERVICE, June 30, 1992 (DEA abductions from Venezuela); Nicaragua Asks U.S. for Return of Nicaraguan Abducted from Guatemala, Reuters, June 23, 1992, A.M. Cycle, available in LEXIS, Nexis Library, REUTER File.

[FN159]. Sharon LaFraniere, Baker Offers Reassurances After Court Kidnap Rulings, WASH. POST, June 17, 1992, at A2; Greg McDonald, Bush Seeks to Ease Mexico's Anger After Ruling on Kidnapping, HOUS. CHRON., June 20, 1992, at A19 (statements by President Bush); see also An Understanding with Mexico, supra note 12, at C6; John Hay, U.S. Assurances of Good Interviews Are not Enough, OTTAWA CITIZEN, July 31, 1992, at A9 (contending that the reassurances offered to Mexico were not applicable to other parties).

[FN160]. See HENKIN ET AL., supra note 79, at 856-58 (citing diplomatic exchanges over Eichmann abduction).

[FN161]. See text accompanying note 44 supra.

[FN162]. O'Higgins, supra note 26, at 296-97.

[FN163]. See LaFraniere, supra note 159, at A2 (reporting statement of Secretary of State James Baker); McDonald, supra note 159, at A19 (repeating President Bush's statements).

[FN164]. For Mexican responses to Alvarez-Machain generally, see Jack Epstein, Growing Uproar in Mexico About Alleged Abuses By U.S., S.F. CHRON., July 7, 1992, at A8; Marjorie Miller, Friendly Fire in Front Lines of Drug War, L.A. TIMES, Aug. 1, 1992, at A3.

[FN165]. Mexican Police Seize Fugitives in U.S., WASH. POST, June 19, 1992, at A20 (discussing Mexican capture of two men near Douglas, Ariz.).

[FN166]. GEORGE F. KENNAN, AMERICAN DIPLOMACY, 1900-1950 (1951); HANS J. MORGENTHAU, IN DEFENSE OF THE NATIONAL INTEREST: A CRITICAL EXAMINATION OF AMERICAN FOREIGN POLICY (1951). Some of the realist literature is surveyed in Trimble, supra note 85, at 665-67. Similar themes are developed, albeit in less systematic fashion, in United States v. Verdugo-Urquidez, 494 U.S. 259, 273-75 (1990) (Rehnquist, C.J., plurality).

[FN167]. HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (1953); KENNETH N. WALTZ, MAN, THE STATE AND WAR: A THEORETICAL ANALYSIS (1954).

[FN168]. See Francis Boyle, The Relevance of International Law to the 'Paradox' of Nuclear Deterrence, 80 NW. U. L. REV. 1407 (1986); Quincy Wright, Legal Aspects of the U-2 Incident, 54 AM. J. INT'L L. 836, 849-50 (1960) (exploring illegality of peacetime spying).

[FN169]. One example is the limitation on assassinations conducted by the CIA. Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (1981), reprinted in 50 U.S.C. § 401 (1988).

[FN170]. Earlier generations of realists often sought to restrain rather than enhance the foreign powers of the Executive. To such figures as Senators Lodge, after World War I, and Taft, after World War II, the Executive Branch seemed idealistic, internationalistic, and overly ready to commit America to ill-considered foreign obligations. Thus, realism meant opposing both Executive Branch power and international law and organizations. The Cold War, however, soon made such thinking moot, as realists quickly endorsed the imperial presidency.

[FN171]. Miller, supra note 164, at A3 (reporting remarks of Mexican Foreign Minister Solana Morales).

[FN172]. See Extraterritorial Apprehension, supra note 64, at 556 (foreseeing possible extradition of American agents); see also Kear v. Hilton, 699 F.2d 181 (4th Cir. 1983) (finding circumstances justified extradition of the kidnappers); Villareal v. Hammond, 74 F.2d 503 (5th Cir. 1934) (discussing rendition of private kidnappers); note 55 supra (return of kidnapper Antonio Felix to Mexico).

[FN173]. Ker v. Illinois, 119 U.S. 436, 444 (1886).

[FN174]. Stephan, supra note 107, at 799-800.

[FN175]. Jaffe v. Boyles, 616 F. Supp. 1371 (W.D.N.Y. 1985); Canada Must Respond to Kidnapping, TORONTO STAR, July 29, 1992, at A14 (letter from Kenneth Walker, citing his civil suit against U.S. over abduction); Michael Isikoff, Cypriot Held in U.S. 'Sting' Pleads Guilty, WASH. POST, Feb. 6, 1993, at A9 (reporting that defendant will not pursue civil suit as part of plea bargain); Newton, supra note 9, at A12 (explaining that ACLU would represent Alvarez Machain in civil suit, according to his counsel); Michael Wines, U.S. Cites Right to Seize Fugitives Abroad, N.Y. TIMES, Oct. 14, 1989, at A6 (discussing suit brought by Verdugo Urquidez). The possibility of civil exposure is noted in Matta-Ballesteros v. Henman, 896 F.2d 255, 261-62 (7th Cir.), cert. denied, 111 S. Ct. 209 (1990); Extraterritorial Apprehension, supra note 64, at 549-56; see also Ex parte Bennett, T.L.R. at 431 (Q.B. 1992) (suggesting civil remedy for abductee to Britain).

[FN176]. See United States v. Verdugo-Urquidez, 494 U.S. 259, 274 (1990) (Rehnquist, C.J.,

plurality opinion) (dicta); Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208-09 (D.C. Cir. 1985) (denying claim under Bivens v. Six Unknown Named Agents of the Fed. Bur. of Narcotics, 403 U.S. 388 (1971)).

[FN177]. The existence of guidelines is suggested by the various public comments of leading officials and their spokespersons. Compare Kidnapping Suspects Abroad, supra note 23, at 8-1 (remarks of Rep. Schroeder, doubting that National Security Council reviewed plans to abduct Alvarez Machain) with id. at 3-1 (testimony of Hon. Abraham Sofaer, noting responsibility moved after abduction of Dr. Alvarez Machain to National Security Council); see also USIA Foreign Press Center Briefing, Walter Kansteiner, June 24, 1992 (FEDERAL NEWS SERVICE) (noting "mechanism being set up" for review of abductions "at the highest levels"); White House Briefing, Marlin Fitzwater, June 23, 1992 (FEDERAL NEWS SERVICE) (confirming National Security Council process).

[FN178]. See Kidnapping Suspects Abroad, supra note 23, at 9-1 (transcribing June 22, 1992 testimony of Professors Steinhardt and Glennon evaluating legislative proposals); Glennon, supra note 71, at 753-54.

[FN179]. See H.R. 5565, 102d Cong., 2d Sess. (1992) (introduced by Rep. Panetta).

[FN180]. Glennon, supra note 71, at 753.

[FN181]. Frisbie v. Collins, 342 U.S. 519, 523 (1952).

[FN182]. See F.B.I. Authority to Seize Suspects Abroad, supra note 76, at 6- 7 (testimony of then Assistant Attorney General William P. Barr). The legal support for inherent presidential powers is sketched out in John McGinnis, Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory, 44 STAN. L. REV. 799, 805-07 (1992).

[FN183]. It is imperative, however, that such bills specify that habeas corpus jurisdiction subsists, lest the abductee languish like the Haitian and Marielito detainees in a legal no-man's-land, subject to detention but ineligible for vindication at trial or for habeas.

[FN184]. Glennon, supra note 71, at 755; see also Bassiouni, supra note 71, at 368 (recommending the International Court of Justice as a forum for abductees). The ancestry of the notion of an international court is surveyed in OPPENHEIM, supra note 119, § 156 n.4, at 298-99 (4th ed.).

[FN185]. Foreign Assistance Act of 1961, § 481(c), 22 U.S.C. § 2291(c) (1988) ("Mansfield Amendment"); see also Lowenfeld, U.S. Law II, supra note 23, at 478-80 (providing a brief history of amendments to Foreign Assistance Act of 1961).

[FN186]. See S. REP. NO. 841, 95th Cong., 2d Sess. 13 (1978), reprinted in 1978 U.S.C.C.A.N. 1845.

[FN187]. A compelling analogy might be the perceived failures of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 211 (codified as amended at 18 U.S.C. §§ 2510-2521 (1988)). Title III provides thorough and detailed regulation of private and governmental surveillance activities. Twenty-five years and one major amendment after enactment, the Title III scheme leaves many observers discontented. They feel that the judicial and agency review processes required by the statute are not adequate filters on surveillance requests. Indeed, courts have begun their familiar process of creating good-faith and harmless-error exceptions to the statute. See, e.g., United States v. Rios, 495 U.S. 257 (1990) (allowing good faith exception for reasonable misinterpretation of statutory language); Scott v. United States, 436 U.S. 128 (1978) (finding no violation even in absence of good faith); United States v. Donovan, 429 U.S. 413 (1977) (extending harmless error doctrine

to application omission); United States v. Kahn, 415 U.S. 143 (1974) (interpreting warrant requirement narrowly). The primary restraints on surveillance turn out not to be Title III or administrative self-restraint, but the complexity of the target technology and the high cost of labor-intensive surveillance.

[FN188]. See United States v. Caro-Quintero, 745 F. Supp. 599, 603-04 (C.D. Cal. 1990) (figures as of May 25, 1990), rev'd sub nom. United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992); HOUSE COMM. ON GOVERNMENT OPERATIONS, IMMIGRATION LIMBO OR THE PLIGHT OF FOREIGN NATIONAL WITNESSES USED IN MAJOR NARCOTICS PROSECUTIONS, H.R. REP. NO. 676, 101st Cong., 2d Sess. (1990) (describing visa needs of abductors and witnesses in several abduction cases); see also FBI Agents as Kidnappers, WASH. POST, Oct. 17, 1989, at A26 (citing costs of abduction).

[FN189]. United States v. Yunis, 681 F. Supp. 891, 895 (D.D.C. 1988), aff'd, 924 F.2d 1086 (D.C. Cir. 1991); Lowenfeld, U.S. Law II, supra note 23, at 445-46.

[FN190]. Critics of abduction are put in a quandary by the Eichmann seizure, and they respond in odd ways. One view holds that the abduction was a violation of international law, but concludes blandly that the Security Council's resolution and Israel's "no-fault apology" settled the matter. The implication is that however weakly, the Eichmann case supports the norm against abduction. See, e.g., Bassiouni, supra note 71, at 366-67; Henkin, supra note 125, at 1; O'Higgins, supra note 26, at 295-96. The relevant diplomatic exchanges are cited in HENKIN ET AL., supra note 79, at 856-58. But this abduction enjoyed almost world-wide support, and the Argentine-Israeli statement was less an international "reparation" than the speedy settlement of a mortifying public relations problem.
Other critics of abduction simply term Eichmann a unique and morally compelling case for abduction-an exception. Mann, supra note 16, at 346. This also resolves nothing, for it fails to define others who fit within the exception.

[FN191]. Yunis, 681 F. Supp. at 907; Emerson, supra note 121, at B2 (citing earlier U.S. attempt to abduct Lebanese Sheik Mughaniyeh); Fairman, supra note 35, at 685-86. For the issue of whether occupied and divided post- war Germany had ceased to function for purposes of extradition, see the cases cited in WHITEMAN, supra note 119, at 740-44; Bassiouni, supra note 71, at 354; Evans, supra note 52, at 88.

[FN192]. The truth about Mexican prosecutorial intentions will probably never be known. On one hand, Mexico had prosecuted many others involved in the Camarena killings and the Caro-Quintero drug trafficking episode, as the Alvarez-Machain amici and dissent stated. See United States v. Alvarez- Machain, 112 S. Ct. 2188, 2197 n.2 (1992) (Stevens, J., dissenting); Brief for the United Mexican States as Amicus Curiae in Support of Granting Review at 26 n.24, United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992) (No. 91-712); Lawyers Committee Amicus Brief, supra note 54, at 4. On the other hand, DEA officials justifiably felt that Mexico's investigation was moving slowly, and they were skeptical as to whether a full investigation would proceed against suspects including then Mexican Attorney General Alvarez del Castillo and the brother-in-law of the former President. See Newton, supra note 9, at A12 (considering case of the Mexican Attorney General).

[FN193]. See Mann, supra note 16, at 340.

[FN194]. See Lowenfeld, U.S. Law II, supra note 23, at 450-51 (luring of Yunis); Wines, supra note 1 (luring of Wilson); see also Newton, supra note 9, at A12 (describing multiple attempts to lure Alvarez Machain). The continuation of the practice is shown by recent examples. See, e.g., Robert O'Harrow, Jr., Man Stepping off Plane at Dulles Is Arrested on Espionage Charges, WASH. POST, Dec. 29, 1992, at B1.

[FN195]. See United States v. Alvarez-Machain, 112 S. Ct. 2188, 2197 n.2 (1992) (Stevens, J.,

dissenting) (citing Mexican efforts against drug lords, including Caro Quintero and two dozen associates).

[FN196]. See text accompanying note 179 supra; see also Kidnapping Suspects Abroad, supra note 23, at 6-1 (testimony of Professor Glennon).

[FN197]. BRIERLY, supra note 69, at 406-07 (expressing skepticism about liberal claims of self-defense). Still, an important starting point is the criteria set out by Secretary of State Daniel Webster in 1842 in concluding the "Caroline Affair": "for such an infringement of territorial rights, the British government must show 'a necessity of self-defense, instant, overwhelming, and leaving no choice of means and no moment for deliberation'; and ... [that] in acting under this exigence, [the defenders] 'did nothing unreasonable or excessive, since the act, justified by the necessity of self- defense, must be limited by that necessity and kept clearly within it.'" FREEMAN SNOW, CASES AND OPINIONS ON INTERNATIONAL LAW 178 (1893); see also 30 BRITISH FOREIGN AND STATE PAPERS, 1841-42, at 195-97 (1858) (describing the British acceptance of narrow formulation of permissible self-defense in theory and rejecting the American claim on the facts).

[FN198]. Compare W. Carlsen, Legal Questions About U.S. Plan to Nab Noriega, S.F. CHRON., Dec. 12, 1989, at A21 and CARTER & TRIMBLE, supra note 44, at 1279-80 (citing Administration's self-defense rationale for Panama invasion) with Anthony D'Amato, The Invasion of Panama Was a Lawful Response to Tyranny, 84 AM. J. INT'L L. 516 (1990); see also NOTIMEX MEXICAN NEWS SERVICE, July 1, 1992 (citing former Attorney General Barr's defense of Alvarez Machain's abduction on grounds of American self-defense).

[FN199]. See, e.g., RESTATEMENT, supra note 1, § 404.

[FN200]. HENKIN ET AL., supra note 79, at 885 (discussing possibility of permissive enforcement against universal crimes).

[FN201]. See D'Amato, supra note 198 (suggesting that humanitarian intervention justifies the arrest of General Noriega).

[FN202]. BROWNLIE, supra note 69, at 548; INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 340-42 (1963); see also NEWMAN & WEISSBRODT, supra note 89, at 545-47 (surveying major rationales for justifying humanitarian intervention).

[FN203]. HANNAH ARENDT, EICHMANN IN JERUSALEM 264 (rev. ed. 1964).

[FN204]. The question of Artukovic's extradition was finally settled, 30 years after litigation began, by Artukovic v. Rison, 784 F.2d 1354 (9th Cir. 1986). For earlier litigation, see United States ex. rel. Karadzole v. Artukovic, 170 F. Supp. 383, 385 (S.D. Cal. 1959) (citing to litigation beginning in 1951). The question stemming from Artukovic's hypothetical abduction was posed by Bassiouni, supra note 71, at 355, and Michael H. Cardozo, When Ext radition Fails, Is Abduction the Solution?, 55 AM. J. INT'L L. 127 (1961). Would the next step be to justify the abduction/rescue of persons on death row in America? See Soering Case, 161 Eur. Ct. H.R. (ser. A) at 4 (1989) (claiming that Virginia's death row violates human rights of inmates).